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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 870

ROBERT B. CURTIS, WILLIAM L. CLAY, REV. CHARLES PERKINS, LUCIEN RICHARDS, NORMAN R. SEAY,
Petitioners,

vs.

WILLIAM BOEGER, Warden, St. Louis City Jail,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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To the United States Court of Appeals for the Eighth Circuit.

Petition for writ of certiorari to review a judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause July 6, 1966, infra, p. 35, rehearing denied August 16, 1966.

CITATION TO OPINIONS BELOW.

The opinion of the St. Louis Court of Appeals is reported at 374 S. W. 2d 557. The opinion of the United States District Court can be found at 240 F. Supp. 475,

the opinion of the United States Court of Appeals is reported at 362 F. 2d 999. The decision of the Supreme Court of Missouri is unreported, but is printed in the appendix hereto, infra, p. 53.

JURISDICTION.

The judgment of the United States Court of Appeals was entered July 6, 1966. Motion for rehearing was denied by the Eighth Circuit, August 16, 1966, infra, p. 52. Petitioners' time for filing petition for writ of certiorari was extended to and including December 16, 1966 by an order signed by Mr. Justice White on November 12, 1966. Jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether First Amendment rights are unconstitutionally infringed when procedures under Missouri law permit a judge to (a) issue a broad and vague *ex parte* injunction (b) serve the injunction on short notice giving no time for leaders to explain it to the pickets (c) require bail of $10,000 each (d) try persons for contempt before the same judge who issued the injunction, without a jury (e) give unlimited fines and jail sentences (f) deny right of appeal, leaving only the remedy of habeas corpus (g) appoint prosecutor with a special interest in the outcome of the case. Whether appellate courts were required to apply the facts of the case to existing constitutional standards for the protection of First Amendment rights.

2. Whether state jurisdiction to issue an injunction was preempted by the National Labor Relations Board. Whether, if state jurisdiction was not preempted, the procedural standards of the Norris-LaGuardia Act apply to state courts in labor injunction cases. Whether the doc-

trine of **United States v. United Mine Workers** was misapplied in this case by the courts below. Whether the refusal of the trial judge to hear evidence pertaining to the nature of the labor dispute and the issue of federal preemption deprived petitioners of due process of law.

3. Whether sentences and fines of more than six months and $300 respectively imposed without jury trial are constitutionally permissible in state courts.

4. Whether the appointment of a prosecutor with a "special interest" in the outcome of a case, who (a) tried petitioners' cases in the newspapers, television and radio (b) who caused a large advertisement pertaining to the case to be published in the daily press before judgment was rendered (c) who assisted in the publishing of a statement by the St. Louis Bar Association pertaining to the case, deprived petitioners of their right to a fair and impartial trial.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

1. This case involves the First, Fifth, Sixth and Section one of the Fourteenth Amendments to the Constitution of the United States.

2. This case involves the National Labor Relations Act, 29 U. S. C. A., § 151, et seq., and the Norris-LaGuardia Anti-injunction Act, 29 U. S. C. A., § 101, et seq.

3. This case involves Mo. R. S. 1959 as amended, § 476.120, as follows:

> "Punishment for contempt may be by fine or imprisonment in the jail of the county where the court may be sitting, or both, in the discretion of the court."

STATEMENT OF THE CASE.

The St. Louis Committee of Recial Equality commonly referred to as CORE, is a branch of the national organization known as the Congress of Racial Equilty. St. Louis CORE has sought to alleviate racial discrimination in public accommodations, housing, government and employment. In the past fifteen years, CORE has negotiated with all types of business enterprise in order to secure jobs and upgrading for Negroes.

In 1961 St. Louis CORE set up a special committee for the purpose of negotiating with banks in the City of St. Louis. The then current statistics showed that out of 5,000 persons working in clerical or teller positions in St. Louis banks, only 35 were Negroes. These figures were interpreted by CORE as reflecting a general pattern of discrimination against Negroes in the banking industry. Figures current and on hand as of June, 1963, indicated that Negroes represented about 30%, of the population of St. Louis and also that unemployment figures for Negroes were 2½ times as high as for white persons. It is against this backdrop that the campaign for jobs and for employment at the Jefferson Bank and Trust Company began.

On August 14, 1963, after two years of futile negotiations, CORE sent a letter to Jefferson Bank asking that the bank hire four Negroes in teller or clerical positions within two weeks (Tr. C. 10, 11). The bank replied with a written communication denying the request (Tr. C. 17, 18). Later, St. Louis CORE sent a committee to the bank for a conference urging the bank to act favorably on the request for the employment of Negroes or to consider alternative plans for hiring Negroes as employees were replaced because of normal turnover (Tr. C. 20, 24).

On Sunday, August 25, 1963, the matter was discussed at a regular meeting of St. Louis CORE and the group

voted to take direct action against the bank if the request was not complied with. The time set for the picketing of the bank was from 4:00 p. m. to 6:00 p. m. on Friday, August 30, 1963 (Tr. C. 663).

On Thursday, August 29, 1963, the Jefferson Bank filed its petition for an injunction in the Circuit Court of the City of St. Louis, Michael J. Scott, Judge, and applied for a temporary restraining order. At a CORE strategy meeting the same night the Committee voted to picket the bank and then by a separate motion by a count of 18 to 13 voted that individuals could risk arrest by standing at the front door of the bank (Tr. C. 743).

Picketing at the bank took place between 4-6 p. m. on August 30. At about 5:10, 8 of the pickets stood in front of the bank door. After a sheriff deputy pushed them to the ground about 50 pickets entered the bank, sang songs and sat in front of teller's windows. They remained there for half an hour. There was no violence, cursing or property damage or arrests made nor were the police requested to arrest anyone (Tr. C. 411, 416a-417). Petitioners Curtis, Clay, Seay, and Perkins did not picket, sing, clap inside the bank. Petitioner Richards did sing inside but did not obstruct teller's cages or any bank activity. None of the petitioners stood in front of the bank's door, nor did they encourage others to do so.

The evidence as to each picketer is as follows:

Petitioner Robert B. Curtis: Witness Feely, a professor at Lindenwood College, stated that Curtis recommended at the Thursday strategy meeting that persons should not disobey the injunction if issued (Tr. C. 778, 798). Witness Ford testified that Curtis urged the group to obey the restraining order on Friday, just before the pickets stood in front of the bank door (Tr. C. 855, 856). Witnesses Feely and Kimbrough, a deputy city marshal, stated that Curtis urged the group to listen to Attorney Howard's

advice about obeying the injunction (Tr. C. 756, 1493). Witness Howard testified in a similar vein (Tr. C. 1427). Officer Sullivan testified that Curtis called for a show of hands of those willing to block the bank's door (Tr. C. 1105). Witnesses Kimbrough, Howard and Ford stated that it was Carl Farris that called for the show of hands and that none of petitioners raised his hand (Tr. C. 1497-9, 850, 858, 1428, 1447). Several witnesses testified that Curtis entered the bank at about three minutes to 6:00 and urged the pickets to leave at 6:00 (Tr. C. 52, 122, 124, 134, 305, 763, 530, 871, 990, 695). Witness Howard testified that at about 5:50, Howard, Charles Oldham, and Curtis got together to devise a plan to get the pickets out of the bank. They decided to use "closing time" as a reason for asking the pickets to leave (Tr. C. 1431-33). Officer Scott remembered seeing Curtis conversing with two people outside the bank about this time (Tr. C. 476, 476a). He also heard Curtis say, "I think I shall go in there and inform them that they are at their own risk, that they're doing this at their own risk", just before he went into the bank to request that the pickets leave (Tr. C. 478).

Petitioner William L. Clay: Witnesses Ford and Howard testified that Clay at 5:10 urged the pickets not to violate the injunction (Tr. C. 859, 1421). Deputy Sheriff Linton stated on direct examination that he heard Clay say, "We'll go in" (Tr. C. 260), however, on cross-examintation, he said, "I am 90% sure it was Mr. Clay (Tr. C. 68-9), "I wasn't paying no attention to the activity out there" (Tr. C. 269). Major Ruff who was located in the fourth floor of the Guth Building several hundred feet away from the bank, testified that he saw Clay motioning to pickets to go into the bank (Tr. C. 383-6). However, Officer Scott who was standing on the sidewalk less than ten feet from the bank testified that he saw a group of pickets walk down Jefferson and go into the

front door and was positive Mr. Clay was not there (Tr. C. 472-3). James Jones, deputy sheriff, also stated, "I am quite sure someone spoke to him (Clay) and he said, 'don't go in the bank'" (Tr. C. 1486).

Peitioner Norman R. Seay: Witness Howard testified that Seay spoke against violation of the restraining order at the gathering on the Guth Building parking lot, Friday at 5:10 (Tr. C. 427). Witnesses Howard and Kimbrough stated that Seay and the other petitioner did not raise their hands (Tr. C. 1428, 1447, 1499). Officer Beech testified that Seay was standing near the curb on Washington Avenue and told a female picket to move back because some people were getting behind her (Tr. C. 330-338).

Petitioner Charles Perkins: Witness Daly testified that Perkins urged him not to stand in front of the bank door and almost persuaded him not to (Tr. C. 1013-14). Perkins observed the front door when pickets were knocked down by Deputy Sheriff Linton. At this point Perkins entered the bank and spoke to Sheriff Tozer about "sheriff brutality" (Tr. C. 334, 694, 360). His gesticulation when addressing Sheriff Tozer were interpreted as acting like a director by Deputy Sheriff Jones (Tr. C. 1487). Officer Scott stated that he did not see Perkins sing, clap or sit on the floor (Tr. C. 543). He did not interfere with bank business (Tr. C. 102, 205, 309, 342, 543).

Petitioner Lucien Richards: Richards went into the bank and participated in the singing and hand clapping (Tr. C. 54, 1541, 693). He did not sit on the floor or stand in front of teller's cages and he left the bank at 6:00 with the other pickets.

Witnesses Ford, Feely and Daly testified that none of the petitioners encouraged them to go into the bank (Tr. C. 875, 773, 780, 1019). There were no witnesses who

testified that they were encouraged by petitioners to violate the restraining order. There was no evidence that petitioners violated the restraining order themselves.

An *ex parte* writ of attachment issued against petitioners and four others on Saturday night, August 31st, and bail was set at $10,000.00 each. Two persons were arrested later the same night and the other seven appeared at the City Jail on Sunday afternoon. A hearing was set for Tuesday, September 3rd before Judge Scott. Petitioners requested a continuance and that bail be lowered to a reasonable amount, and to be informed of the charges against them. The court denied all requests (Tr. C. 14-25, 9/3/63).

After a postponement for filing a writ of prohibition and to take depositions, notices of contempt were filed on September 18th. The trial began on September 23rd and petitioners and four others were convicted and sentenced on October 24, 1963 (Tr. C. 1558-1638). They were denied bail, time to set their affairs in order and the right to appeal (Tr. C. 1638-9).

REASONS FOR GRANTING THE WRIT.

I.

Certiorari Should Be Granted to Determine Whether Petitioners' Rights Under the Due Process and Equal Protection Clause of the Fourteenth Amendment Were Infringed by Their Conviction for Criminal Contempt Where the Injunction They Are Charged With Disbbeying Is in Violation of Their First and Fourteenth Amendment Rights.

The Court below has held at 302 F. 2d 999, 1007 that petitioners did not raise their First Amendment claim in the state court or in the U. S. District Court and there-

fore the issue was not fairly or adequately raised at the level of the Circuit Court of Appeals. This contention is hard to understand since the St. Louis Court of Appeals specifically ruled on this question holding:

> "The activities of the petitioners found herein to constitute contempt go far beyond those areas of freedom of speech and peaceful assembly protected by the Constitution of the United States and of Missouri. It has been held that the First Amendment does not confer the right to persuade others to violate the law. Kasper v. Brittain, 6 Cir., 245 F. 2d 92." **Curtis v. Tozer**, 374 S. W. 2d 557 at page 595.

Similarly, it is difficult to see how petitioners' First Amendment claims can be defeated simply because the issue was ignored and not passed upon by the U. S. District Court. The Supreme Court has always claimed the right to enforce constitutional liberties even when denied through spurious findings of fact in the lower courts. **Milk Wagon Drivers v. Meadowmoor Dairies**, 312 U. S. 287 at pages 298-9.

(A) **The ex parte injunction of August 30, 1963, infringed petitioners' rights under the First and Fourteenth Amendments and is therefore void on its face and as applied.**

The Injunction was vague and too broad.

Although picketing per se was not barred by the injunction, it is impossible for a lawyer (not to mention a layman) to tell what activity was permitted or prohibited. For example what does it mean when the injunction says in paragraph (a) "Physically hindering, obstructing, interfering with, delaying, molesting or harassing" or (b) "And therein engage in any acts or conduct of whatsoever character which interferes with, intimidates, harasses, hinders and annoys plaintiff's employees" or (c) "Physically hindering, obstructing, interfering with, intimidating

or in any other manner preventing customers''? We are not informed as to what conduct constitutes ''annoys'' or ''harasses.'' The plain fact is that conduct which may ''annoy'' or ''harass'' one person may not have the same effect on another. It is quite possible that picketing or the very presence of CORE members at the bank ''annoyed'' or ''harassed'' the bank's officers and employees. On the other hand many of the bank's customers were glad to see CORE attempting to get jobs for Negroes and some joined the picket line. Also the purpose of a picket line is usually designed to deprive an employer of business and therefore to ''interfere'' with business. It is therefore quite apparent that the injunction herein is far too broad and vague in its terms and it therefore included constitutionally protected as well as non-protected activity. Compare **Apetheker v. Secretary of State**, 378 U. S. 500, 515-518, and **NAACP v. Button**, 371 U. S. 415, 433-438.

(B) **Both the St. Louis Court of Appeals and the United States Court of Appeals for the Eighth Circuit have failed to apply the proper standards for the determination of petitioners' rights under the First Amendment.**

The St. Louis Court of Appeals 374 S. W. 2d 557, 595, and the U. S. Court of Appeals, 362 F. 2d 999, 1007, have said in substance that the conduct of petitioners goes far beyond the realm of protected free speech. We are not informed as to the character of the specific conduct and/or speech involved herein. Both court opinions summarily dismissed petitioners' contentions without applying the facts to the clear and present danger test as prescribed by the Supreme Court for contempt cases involving the First Amendment. Compare **Wood v. Georgia**, 370 U. S. 375; **Pennekamp v. Florida**, 328 U. S. 331; **Bridges v. California**, 314 U. S. 252; **Kasper v. Brittain**, 245 F. 2d 92, 96. Contempt, like insurrection, advocacy of unlawful acts, breach of the peace, obscenity and solicitation of legal business is not immuned from constitutional limitations

and therefore, must be measured by standards that satisfy the First Amendment. **New York Times v. Sullivan**, 376 U. S. 254, 269.

In order for free speech to be punished or curtailed by contempt of court there must be a clear and present danger to a vital state interest—not the private interest of a business institution. See **Herndon v. Lowery**, 301 U. S. 242, 258. In **American Federation of Labor v. Swing**, Justice Frankfurter speaking for the Court said at 312 U. S. 321, 326:

> "Communication by such employees of the facts of a dispute deemed by them to be relevant to their interests can no more be barred because of concern for the economic interest against which they (the pickets) are seeking to enlist public opinion than could the utterance protected in Thornhill's case."

The question of exactly what utterances were made by petitioners and how such utterances caused violation of the injunction is now more confused than ever. The St. Louis Circuit Court making no specific findings of fact simply copies verbatim from the allegations contained in the notices of contempt which were the same for each petitioner (Tr. C. 1558-1638). The St. Louis Court of Appeals attempted to remedy this defect by making findings as to how each petitioner might have "encouraged" by word or gesture, violation of the restraining order. These findings were arrived at by considering only the evidence which tended to support the trial court's finding of guilt. **Curtis v. Tozer**, supra, at pages 577-584. However, the U. S. Court of Appeals making no findings as to the conduct of specific individuals, remarkably concluded that "In the demonstrations, the petitioners blocked the entrance to the bank by standing in front of the entrance locking arms and blocked entrance to the tellers' windows by sitting and lying in front of such windows." See **Ford v. Boeger**, 362 F. 2d 999, 1003. This

confusion undoubtedly resulted from the fact that the court consolidated three separate contempt cases for purposes of briefing and argument, and then failed to distinguish between the facts of each case. This was the first time that any court has held that petitioners did anymore than "encourage" others to violate the restraining order.

The trial court's judgment of contempt seemingly rests solely on the ground of petitioner's alleged utterances which were said to have caused violation of the restraining order. Petitioners have consistently denied that they advocated violation of the restraining order and the transcript contains conflicting testimony much of which points to the opposite conclusion—that, in fact, petitioners urged compliance with rather than violation of the injunction. It is to be noted that the trial court found Raymond Howard guilty of contempt even though all of the evidence pointed to the fact that he urged compliance with the Court's order. See **Curtis v. Tozer**, supra, at page 580.

Neither of the courts below made any finding or conclusions appraising petitioners' statements in accordance with the standards set down in **Bridges**, supra; **Pennekamp**, supra; and **Wood**, supra. Nor was there any effort to prove that said utterances or gestures caused others to violate the injunctions.

Petitioners had a right under the First Amendment to say that the injunction was unfair or to protest "sheriff brutality" when a deputy sheriff pushed several small children to the ground. They were free to state before the television cameras their attitude toward the injunction or even that the judge erred in issuing the injunction (although they did not). They had a right to ask the pickets to leave the bank without having to risk the request would be interpreted by the St. Louis Court of Appeals as an invitation to continue violating the injunction. Compare (Tr. C. 1431-3) with **Curtis v. Tozer**, supra,

at 582; **Craig v. Harney**, 331 U. S. 367, 375-377. As Mr. Justice Brennan wrote in **In Re Sawyer**, 360 U. S. 622, 635, "Dissenting opinions in our reports are apt to make petitioner's speech look like tame stuff indeed."

(C) **The procedure used for the hearing on the issuance of the injunction and the methods employed for petitioners' arrest, bail, trial and appeal failed to provide the safeguards necessary for the protection of First Amendment rights.**

(1) The suit for temporary restraining order was filed on August 29, 1963. The **ex parte** order was issued at 2 p. m., August 30, 1963, without notice and hearing. The trial court elected not to hold a hearing on the matter until September 26, 1963—almost a month after the issuance of the restraining order making it impossible to test the legality of the restraining order until that time and creating fear in the minds of those who would desire to peacefully picket but for the existence of the restraining order. In this respect the restraining order constituted a prior restraint on the exercise of First Amendment rights and it cannot stand for that reason alone. **Thomas v. Collins**, 323 U. S. 516; **Near v. Minnesota**, 283 U. S. 697.

(2) The injunction was not served on petitioners until 5:00-5:30 p. m.—after the picketing of the bank had been in progress for at least an hour. There was no time to call a special CORE meeting to call off the picket line or to advise all participants as to the terms of the injunction and to warn against violation. It is difficult enough to plan and execute a picket line when large numbers of unknown persons participate and the possibility of racial antagonism exists, without having to cope with an **ex parte** injunction handed out while protest is in progress. Petitioners clearly did not have fair warning of the existence of the **ex parte** injunction or its terms. An injunction should not be used to serve as a means for the harassment of selected individuals or as a trap for the unwary.

(3) Although no arrests were made at the bank on Friday, August 30, the trial court issued a writ of attachment on Saturday night, August 31, against nine so-called leaders of CORE. Bail was set at $10,000 each. Of the nine persons selected for attachment only one had picketed inside of the bank. Petitioners were later tried for contempt of court before the same judge who issued the injunction, without a jury, and sentenced to jail terms ranging between 60 and 270 days and fines of $500-$1,000. No appeal is allowed from a judgment of criminal contempt in Missouri and there is no limit on the length of sentence or the amount of fine a prosecuting judge is permitted to hand out.

Petitioners submit that these procedures are lacking in elementary due process for any civil or criminal case but when First Amendment rights are involved the lack of procedural safeguards is all the more glaring. See **Speiser v. Randall**, 357 U. S. 513.

II.

Certiorari Should Be Granted to Review the Holding That State Jurisdiction Was Not Preempted by the National Labor Relations Act: That the Norris-LaGuardia Act Does Not Apply to State Court: and That the Supreme Court Decision in United States v. United Mine Workers, 330 U. S. 258, Is an Alternative Reason for Denying Petitioners Relief.

(A) In its opinion the court below assumed that CORE is at least arguably a labor organization and that the dispute is a labor dispute covered by the act. See **New Negro Alliance v. Sanitary Grocery Co.**, 303 U. S. 552; **San Diego Building Trades Council v. Garmon**, 359 U. S. 236.

The Court below then concludes that no preemption exists because state courts retain jurisdiction to use the

injunctive process where violence exists. Then in footnote No. 3 the Court states: "At the time the sentences were imposed the repetitive violent demonstrations created a situation which required effective state action to re-establish law and order." 362 F. 2d 999, 1008. There was absolutely no violence by any picket at Jefferson Bank either before or after the restraining order was issued. All prosecution witnesses verified this fact, and there were no arrests at the bank on August 30, 1963. (See testimony of Major Walter Eitzman, Scene Commander in Appendix.) The finding of violence by the court below is especially surprising when one considers that no such findings were made by the trial court or the St. Louis Court of Appeals, **Curtis v. Tozer**, supra. It is to be noted that the court below affirmed the denial of evidentiary hearing on the ground that "no facts are in dispute and that the dispute relates only to conclusions of law." It is clear that there was no evidence to support a finding that petitioners or any one else committed any act of violence.

Labor injunctions have been held not preempted in **Allen Bradley Local v. Wisconsin Employment Relations Board**, 315 U. S. 740; **United Auto v. Wisconsin Employment Relations Board**, 351 U. S. 271; and **Youngdahl v. Rainfair, Inc.**, 355 U. S. 131. All of these cases involved violent conduct which occurred before the injunction was issued and they all are pre **Garmon** cases.

Since no question of violence is involved the question presented here is: were the activities of either St. Louis CORE or Jefferson Bank arguably prohibited by Section 8 or protected by Section 7 of the Act? If answered in the affirmative, it is clear that the exclusive jurisdiction over such conduct and its prevention is in the NLRB. **San Diego Unions v. Garmon**, supra.

In the instant case CORE has charged racial discrimination and other unfair labor practices committed by

Jefferson Bank in violation of Sec. 8 (a) (1) and (2) and Sec. 7 of the Act[1] by attempting to restrain and coerce members of CORE in the exercise of their right to self organization, to bargain collectively and to engage in other concerted activities for the purpose of collective bargaining or their mutual aid and protection and by publicly denouncing and using state agencies including the sheriff's office, police department, Mayor of St. Louis, Governor of Missouri and a court injunction to frighten and intimidate members of CORE. **Tygart Sportswear Co.**, 77 NLRB 613; **Borg-Warner Corp.**, 113 NLRB 1288; **Aldna Mills**, 79 NLRB 1; **Biff Mfg. Co.**, 82 NLRB 1081.

The Bank alleges that CORE was guilty of unfair labor practices by violating Sec. 8 (b) (1) (A) and (B) of the Act by coercing its employees, by harassing them and by preventing their exit from and entry to the bank and by trying to force the hiring of Negro employees. **National Maritime Union**, 78 NLRB 971; **Typographical Union**, 86 NLRB 951; **NLRB v. Local 140 Furniture Workers**, 233 F. 2d 531. In addition the bank charges that CORE violated Sec. 8 (b) (4) (D) and 8 (b) (7) of the Act by trying to force them to hire Negroes in clerical positions and to recognize CORE as a bargaining agent. **Longshoremen v. Warehousemen Local 10**, 82 NLRB 650; **NLRB v. Drivers**, 362 U. S. 274.

In **Weber v. Anheuser-Busch, Inc.**, 348 U. S. 468, the Supreme Court overturned a state injunction prohibiting picketing, violence, etc., finding, even though the pickets were standing on the railroad tracks and their lives were endangered, "We do not read this as an unambiguous

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[1] Much of the proof of these allegations is not contained in the transcript because the U. S. District Court below denied petitioners an evidentiary hearing. Petitioners have never ceased to assert their innocence of the charges and that they were victims of an attempt by local authorities to destroy CORE by punishing its leaders.

determination that the IAM's conduct amounted to the kind of mass picketing and overt threats of violence which under the **Allen Bradley Local** case give the state court jurisdiction." 348 U. S. 468 at page 482. Comparing the conduct of the CORE pickets in the instant case with the union pickets in **Weber** one can readily see that here we are not faced with danger to life or limb or violence. The court's holding in **Weber** is significant in view of the fact that **Weber** is a pre-**Garmon** case. Since **Garmon**, because of conflicting and inconsistent state labor decisions, procedures and policies, this court has gone all out to guarantee primary jurisdiction to the NLRB. See **Local No. 438 Construction v. Curry**, 371 U. S. 542.

With regard to state versus NLRB jurisdiction this Court has clearly defined its policy saying, "Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered." **San Diego v. Garmon**, supra, at page 246. "While the Board's decision is not the last word, it must assuredly be the first." **Marine Eng. Ben. Ass'n v. Interlake**, 370 U. S. 173, 185.

Perhaps the clearest statement of this court's determination to insure a uniform application federal labor legislation can be found again in **Garmon** at page 246:

> "It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows from our decisions in Weber and Guss. The governing consideration is that for the States to

control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."

(B) The court below held that the Norris-LaGuardia anti-injunction Act, 29 USCA 101 et seq., does not apply to state courts, citing **American Dredging Co. v. Local 25**, 3 Cir., 338 F. 2d 837, 850-56 cert. den. 380 U. S. 935, as authority. The holding in **American Dredging** is clearly erroneous as pointed out by Judge Hastie in the dissenting opinion. The majority opinion cited several state court decisions, including the case at bar, but fails to cite any post **Garmon** Supreme Court decision to support its view. This failure is crucial when one considers the painstaking effort this Court has recently put forward to guarantee uniformity in the application of substantive and procedural labor policy throughout the United States.[2] See **Republic Steel Corp. v. Maddox**, 379 U. S. 650.

Recent Supreme Court decisions construing Sec. 301 of the Act and their relationship with the case at bar becomes obvious when we consider the chronological course of labor litigation. In **Textile Workers Union v. Lincoln Mills**, 353 U. S. 448, 451-54 this court construed the provision of Sec. 301 to authorize the federal judiciary to fashion and apply federal law governing collective bargaining agreements. Later the Court held that actions based upon Sec. 301 could be brought in state as well as in federal courts, **Charles Box Co. v. Courtney**, 368 U. S. 502, that in such suits state courts must apply federal law, **Local 174 Teamsters Union v. Lucas Flour Co.**, 369 U. S. 95, and that the Norris-LaGuardia Act proscription of federal injunctive relief from strikes in virtually all labor suits precludes injunctions in Sec. 301 cases. **Sinclair Ref. Co. v. Atkinson**, 370 U. S. 195. It is therefore clear that the strictures of the Norris LaGuardia Act for-

[2] Missouri has no "Little Norris LaGuardia Act" as does Wisconsin, New York and many other states.

bids injunctions in most cases (and never permits *ex parte* injunctions by private litigants) and that federal law must be applied by the state court pursuant to the holding in **Lucas Flour Co.** This position was taken in dissenting opinion of **American Dredging** where Judge Hastie stated, "Summarizing, I think the question of removability affects no substantive issue here because a state trial court, no less than a federal district court, would be bound to apply federal labor law and deny injunctive relief as was done in the Sinclair Refining case." 338 F. 2d at page 858.

This same logic is applied to **American Dredging** under **Recent Cases** in 78 Harvard Law Review 1965 where the author states at page 1667:

> "As neither the legislative history nor the language of section 301 intimates any intention to preclude state court injunctions, the decision in American Dredging seems at first blush to represent a reasonable implementation of the congressional purpose. The trouble with this line of reasoning is that it conflicts with the line of Supreme Court decisions interpreting section 301. In Local 174, Teamsters Union v. Lucas Flour Co., the Court held that the judicially created federal contract law under section 301 has pre-empted the area of collective bargaining contract law; therefore, in industries affecting interstate commerce, a state suit for an injunction arises under federal law as least with respect to questions contract interpretation. Moreover, if the Norris LaGuardia Act is part of the preemptive federal law, even the availability of injunctive relief is governed by federal law. In view of the holding in Sinclair Ref. Co. v. Atkinson that Norris-LaGuardia must be applied by the federal courts exercising their jurisdiction under section 301, it seems anomalous to hold that the act does not also apply to the state courts; for the

prohibition against injunctions is surely one of the most important aspects of federal labor policy, and is therefore as entitled to preemptive effect as the contract law governed by Lucas."

(C) The court below has erroneously applied the doctrine in **United States v. United Mine Workers**, 330 U. S. 258, to the case at bar, 362 F. 2d at pages 1005-6. This holding is in direct conflict with at least two recent Supreme Court decisions which refused to apply the **Mine Workers** decision to post **Garmon** injunction-contempt cases. **In Re Green's Petition**, 369 U. S. 689; **Ex Parte George**, 371 U. S. 72. In Green's case the facts are similar to this one. Green was convicted of violating an *ex parte* restraining order issued by a state court in connection with a labor dispute. During the contempt hearing the trial court refused to permit Green to introduce evidence pertaining to the labor dispute or to establish that the state court was acting in an area reserved for the NLRB. Likewise, in the contempt trial in the case at bar, the trial judge refused to hear evidence pertaining to the nature of the dispute and the issue of federal preemption raised in petitioners' pleadings (Tr. C. 59-74a). This court reversed Green's conviction with the following statement:

> "Even if we assume that an ex parte order could issue as a matter of state law it violates the due process requirements of the Fourteenth Amendment to convict a person of contempt of this nature without a hearing and an opportunity to establish that the state court was acting in a field reserved exclusively by Congress for the federal agency." 369 U. S. at pages 692-3.

Since the decision of the U. S. District Court denying an evidentiary hearing was affirmed by the U. S. Court of Appeals, petitioners were never granted the opportunity

to introduce evidence touching upon the nature of the controversy or the jurisdiction of the state court to issue its injunction.

(D) Perhaps the most important reason why certiorari should be granted on this issue is demonstrated by the alarming lack of serious consideration given it by the courts below. As a result, none of them has come forthrightly out and stated that this controversy involving an attempt of Negroes to gain employment is a bona fide labor dispute. The St. Louis Court of Appeals stated, "In the light of this declared public policy, and in view of the decisions of the Supreme Court of the United States in Hughes v. Superior Court of California for Contra Costa County, 339 U. S. 460, it is at least doubtful whether the petitioners' demands for the employment of four Negroes solely because of their race, may be considered a labor dispute." 374 S. W. 2d 557, 594. In **In Re Curtis' Petition** the District Court said "What might otherwise be a labor dispute between a union and an employer ceases to be a 'bona fide labor dispute' when an unlawful demand is made." 240 F. Supp. 475, 481. (The indication here is that when a white labor union makes an unlawful demand it is an unfair labor practice—when a Negro labor organization does the same it is not even a labor dispute. This is a surprising statement in light of the fact that the trial court refused to permit any evidence about the nature of the dispute and the U. S. District Court denied an evidentiary hearing on this issue.) The U. S. Court of Appeals stated in **Ford v. Boeger**, "Inasmuch as we are of the view, as hereinafter set forth, that no preemption exists under the facts of this case, we shall in the interest of not unduly prolonging this opinion assume without so deciding that CORE is a labor organization and that the dispute is a labor dispute covered by the Act." 362 F. 2d 999, 1003. Negro job demands were handled in the same way in **Potomac Electric Power Co. v. Washington**

Chapter of Congress of Racial Equality, 210 F. Supp. 418; Compare **NLRB v. Tanner Motor Livery, Ltd.**, 349 F. 2d 1.

Since racial discrimination has forced many Negro workers to seek organizational support outside of the established labor movement, any holding that does not clearly establish the right of Negroes to organize and assert their economic interest within the protection of the federal labor law would have a disastrous effect on such organizations. Even Negroes who are permitted to join white labor unions have great difficulty in getting the union officials to process their grievances in good faith. The holdings by the courts below seem to indicate that Negro job requirements, demands and activities do not rise to the stature of "bona fide labor disputes" and are therefore only "social problems"—despite the fact that Negroes like other persons must work in order to eat. This attitude is particularly unfortunate coming at a time when the pressure of the Negro for jobs, upgrading and a better life coincides with automation and new methods of production that tend to increase the percentage of unemployed of all races throughout the entire nation. The increasing competition for "Jobs Now" is bound to create more labor difficulties in the future not only in the South but also in the North where Negroes are still found at the bottom of the economic ladder. The unwritten law among many white business and civic leaders is to keep them at the bottom and thus there is great likelihood that state labor injunctions will be widely used in the future to keep "Negroes in their place" by convicting those whom local authorities consider "troublemakers" of criminal or civil contempt without benefit of a jury trial or impartial tribunal. **E. g., NAACP v. Alabama**, 377 U. S. 288; **Hamilton v. Alabama**, 376 U. S. 650; **Walker v. City of Birmingham**, 181 So. 2d 493, cert. granted 87 S. Ct. 62.

The plight of the Negro workingman who strives to break down the barriers of racial discrimination in em-

ployment is made worse by the cost of the litigation that he must incur if state courts are allowed to enjoin his activities. Large labor unions have huge financial reserves from which to employ counsel; many labor organizations have several lawyers on their full time staffs, whose job it is to represent the union before the NLRB and if necessary to appeal an adverse decision to the Supreme Court. However, racial discrimination by both labor unions and employers has forced the bulk of Negro workers to seek organizational support outside of the established labor movement.

Such groups as CORE have few if any monetary reserves upon which to finance costly litigation. Those who supported the National Labor Relations Act, 1935, found labor unions in much the same financial condition as CORE and they made provisions for the NLRB to investigate complaints and provide a remedy that heretofore had not existed.

III.

Certiorari Should Be Granted to Review the Holding That Cheff v. Schnackenberg, 384 U. S. 373 Did Not Rest on Violation of Constitutional Right to a Jury Trial But Only Upon Supervisory Power Over Federal Courts.

A.

Missouri law denies a jury trial to persons accused of criminal contempt and appellants have not waived their right to assert their claim here.

Petitioners were sentenced to terms ranging between 90 and 270 days and received fines of $500 to $1,000 plus costs of court. At the time these cases were pending before the St. Louis Circuit Court no request for a jury trial was made and it would have been useless for petitioners to request a jury trial because Missouri law denies this

right to a person accused of contempt of court. **State v. Shepherd,** 76 S. W. 79; **De May v. Liberty Foundry Co.,** 37 S. W. 2d 648. Upon conviction a judge may sentence the offender to an unlimited jail term or levy an unlimited fine or both in his discretion. See Mo. R. S., 1959, Sec. 476.120.

In view of the severity of the sentences and the fact that the judge who issued the injunction also tried the contempt cases in which petitioners had no statutory or constitutional right to a jury trial under Missouri law, it would seem that justice would require that this issue be adjudicated here.

B.

The severity of the sentences that were imposed or could have been imposed according to Missouri law required that petitioners be granted a jury trial pursuant to the sixth and fourteenth amendments to the federal constitution.

In **Cheff v. Schnackenberg,** 384 U. S. 373, this Court granted certiorari to determine whether or not a six months jail sentence, without jury, is permissible under the Sixth Amendment of the Constitution. The Court held that it was; but a sentence in excess of six months would not be permissible. The decision clearly rested on constitutional grounds and not on supervisory authority as the court below holds. See **Ford v. Boeger,** supra, at pages 1006-7.

Whether or not this construction of the Sixth Amendment is applicable to the states can be gleaned by several recent Supreme Court decisions which have made Sixth Amendment rights and standards obligatory on the states and essential to due process of law under the Fourteenth Amendment. **Gideon v. Wainwright,** 372 U. S. 335; **Pointer v. Texas,** 380 U. S. 400; **Douglas v. Alabama,** 380 U. S. 415.

Furthermore it is clear from current legislation that the United States Congress considers only fines and jail sentences of $300 or less and 45 days or less, respectively, as "petty" and not requiring a jury in criminal contempt. See Civil Rights Act, 1957, 42 U. S. C. A., Sec. 1995.

Petitioners therefore contend that the jail sentences for Curtis and Clay and all fines were constitutionally excessive and imposed in violation of their rights under the Sixth Amendment.

IV.

Certiorari Should Be Granted to Review the Holding That the Appointment of Wayne Millsap as Special Prosecutor and His Conduct During and After the Trial Did Not Rise to the Stature of Federal Constitution Rights and Therefore Petitioners Were Not Entitled to Release on the Ground That Millsap's Conduct Deprived Them of a Fair Trial.

The appointment of Wayne Millsap as "special prosecutor" and his conduct before, during and after the trials deprived petitioners in Curtis et al. of their rights under the fifth amendment and of their right to a fair and impartial trial.

The record clearly shows that the appointment of Wayne Millsap as "special prosecutor" for the Court substantially prejudiced the right of petitioners to a fair and impartial trial for the following reasons:

1. Wayne Millsap was the lawyer for Jefferson Bank and Trust Co. He initiated the contempt proceedings by direction of the Board of Directors of the Bank (Tr. 120). He is the son-in-law of the bank's president, Dillon Ross, and a director of the bank. He and the bank had a pecuniary interest in the outcome of the trials which were allegedly held to "vindicate the majesty of the law

and the dignity of the court". This pecuniary interest stemmed from two sources: (1) The Jefferson Bank and CORE were engaged in a conflict of economic interest over the hiring of Negroes. Anytime one party to a labor controversy is given unfair advantage over the other, he can exterminate his opponent or competitor whether one runs the other one out of business or manages to have him sentenced to a jail term. The same interests are at stake in all labor disputes—if one side can win out over the other, great benefits accrue to the victorious party. (2) The bank would be liable for damages for false arrest or malicious prosecution if petitioners were acquitted. This position is taken in 42 Am. Jur. 11 at page 243:

> "And in some jurisdictions statutes have been enacted which expressly forbid assistance of any attorney in a criminal prosecution if he is interested in a civil action in which a recovery might be had on what is involved in the criminal prosecution."

It should be noted that no one has contended that "impartial" or "disinterested" persons were unavailable to perform this function for the court. However, the special interest of Millsap explains why he did everything in his power to inflame the public against petitioners and to deny them a fair and impartial hearing, both during the trials and while writs of habeas corpus were pending in the St. Louis Court of Appeals. "A fair trial in a fair tribunal is a basic requirement of due process." **In re Murchison**, 349 U. S. 133, 136.

2. In R. S. Mo. 1959, Supreme Court Rule 4.20, we find the following admonition:

> "4.20. Newspaper Discussion of Pending Litigation. Newspaper publication by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the courts and otherwise prejudice the due administration of justice. Generally they are to be con-

demned. If the extreme circumstances of a particular case justify a statement to the public, it is unprofessional to make it anonymously. An ex parte reference to the facts should not go beyond quotation from the records and papers on file in the Court; but even in extreme cases it is better to avoid any ex parte statement."

In spite of the Canons of Ethics regulating the conduct of Missouri lawyers, Wayne Millsap issued numerous denunciations of CORE through the media of radio, television and the press.

Adverse publicity may prejudice a defendant's constitutional rights even when a case is tried before a judge without jury.[1]

This situation can be further aggravated when a judge who issues an injunction is also the trial judge in contempt proceedings for its violation. And because judges are frequently the object of great pressures from the press, they have frequently held offenders in contempt of court. **Toledo Newspaper Co. v. United States,** 247 U. S. 402; **Bridges v. California,** supra; **Pennekamp v. Florida,** supra. In **Estes v. Texas,** 381 U. S. 548, 549, Justice Clark affirms this point:

"Our judges are high-minded men and women. But it is difficult to remain oblivious to the pressure that

[1] The Public Trial and Free Press, William O. Douglas, 33 Rocky Mountain Law Review 1, 2, 3, "Newspapers, radio and television are in the hands of men who have their own political philosophy and their own ideas as to what justice is and how it should be administered. Some newspapers dominate a community. When ownership of the radio and television station, the community may become saturated with one point of view. We have had publishers who were tyrants and sought to impose their will on the courts as well as on the people . . . Even federal judges who have life tenure may feel the lash of editorials demanding that cases be decided this way or that.

". . . At times the papers can help to arouse passions in a community so that no trial can be a fair one."

news media can bring to bear on them both directly and through the shaping of public opinion."

In light of the foregoing authorities it is clear that: (1) A defendant's right to a fair trial is constitutionally protected from adverse public comment. (2) The probability of prejudice is sufficient to gain a new trial—actual prejudice is not required. (3) Both judges and juries can be influenced by unfair pressures.

The following facts could have been presented at an evidentiary hearing.

During the campaign for jobs at Jefferson Bank, CORE and petitioners were subjected to a continuing stream of public attacks by the local newspapers, television and radio stations. These attacks lasted throughout the trials and while petitioner's writs of habeas corpus were pending in the St. Louis Court of Appeals.

In addition to daily public comments by Millsap, statements were made by Mayor Raymond Tucker, Governor John Dalton, Donald Gunn, President of the Board of Alderman, State Senators Michael Kenney and Theodore McNeal, all of whom were influential political leaders.

Between August 28, 1963, and January 16, 1964, the St. Louis Globe Democrat (the city's only morning newspaper) printed 14 editorials and 17 separate smear articles denouncing and holding petitioners up to public ridicule. Seven of these editorials and five smear articles were published in the **Globe** during the month of October, 1963. Two of them were captioned "Bank Demonstration Leader is Convicted Morals Offender" and "Move to Disbar CORE Lawyer Here". They were apparently timed to apply pressure on Judge Scott and to inflame the public against petitioners before judgment and sentencing on October 24. The last ten smear articles entitled "Communism in CORE" beginning December 27, 1963, and

ending January 5, 1964, were designed to influence the St. Louis Court of Appeals before their decision on petitioners' writs of habeas corpus on January 15, 1964. Almost all of these smear articles were prominently displayed on the front page of the Globe.

During the trial of petitioners in **Ford et al.**, the **Globe, Post-Dispatch, Argus,** and **American** published a large paid advertisement entitled "Facts on Jefferson Bank and Fair Employment". This ad sought to discredit petitioners and to mobilize public opinion on the side of the bank and against petitioners. It was printed before Judge Scott had announced his decision in the three contempt cases.

Immediately after the Court sentenced petitioners on October 24, defense counsel announced their intention to seek review of the convictions in the St. Louis Court of Appeals. In spite of the pending review and the fact that complaints had been filed with Missouri Bar, against Curtis, Oldham and Howard, the executive committee of the St. Louis Bar Association, **while Wayne Millsap was a member of that body,** authorized John Shepherd, president to issue a press release denouncing what they termed petitioners' "lawlessness" and "contempt for the law". It is noteworthy that more than 10,000 serious crimes, including robbery, murder, rape and aggravated assault are committed in St. Louis every year; however, the St. Louis Bar with all its power, influence and prestige chose to direct its attack at petitioners.

Throughout the entire period before and during all three trials Judge Scott failed to take any action to curb Millsap or the press media. Comment about the pending cases was totally unhindered by any governmental or private authority. Judge Scott appointed Millsap as "special prosecutor" after a television appearance August 30, in which Millsap made a scathing attack on petitioners. See **Shepard v. Maxwell,** 384 U. S. 333.

In many cases it is difficult to ascertain what effect adverse publicity had on a particular trial. This case speaks for itself. We need only to look to the sentence of James Peake to arrive at a decision. Peake is a paraplegic. A wheel chair in his only means of locomotion. He was convicted of failing to wheel himself out of the bank. For this "crime" Judge Scott reserved his longest sentence, one year in a 4 x 8 cell at the City Jail. These sentences were so outrageous that the **Globe** found it necessary to bolster Judge Scott's public image. On October 26, 1963, the Globe printed a feature article on the front page entitled "Judge Scott Is a Man of Rare Ability". Two days later an editorial appeared with the caption "Kind of Judge He Is". The fact that bail for petitioners in **Curtis et al.** was set at $10,000 (bail set by U. S. Court of Appeals, 8 Cir., was $500 after conviction) and that Judge Scott refused to lower this figure even though petitioners voluntarily surrendered themselves into the custody of the Sheriff after reading about the attachment order in the Newspaper (Tr. C, 22-25, 9-3-63); that he attempted to proceed to trial on September 3, without informing petitioners of the charges and without time to consult with counsel (Tr. C, 14-21, 9-3-63), leads to the inescapable conclusion that a formidable array of influential personalities and interests from the Governor to Millsap and from the Globe-Democrat to the St. Louis Bar Association caused the trials of petitioners to be conducted in an atmosphere of tension and hostility which effectively deprived petitioners of a fair trial before a fair tribunal.[2]

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[2] The following additional statements by Millsap were submitted to the Court below as offers of proof in case the Court saw fit to grant an evidentiary hearing:

8/28/63. Post-Dispatch—Millsap "to hire a certain number of Negroes would violate Missouri and St. Louis Fair Employment Laws. Demonstrations may impede progress of Negroes."

8/30/63 KMOX-TV-KSD-TV—Millsap "Leadership of CORE consists of attorneys. Ray Howard, said that there would be

Millsap (with knowledge that he intended to press charges for criminal contempt) took petitioners' depositions on the 7th and 8th of September under the rules of civil procedure (Tr. C, 39; 9-3-63). Petitioners in **Curtis**

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a peaceful demonstration. He represented to the Court that there was never any violence at a CORE demonstration. We didn't have to allow picketing but it was allowed because we believed Mr. Howard. The lawyers in CORE violated the ethics of their profession in precipitating this dastardly deed. This is the worst contempt of judicial orders ever done in the city. The law was clear to all of the demonstrators. The court could fine and imprison persons who are in contempt. Also with regard to the lawyers this matter will be taken up with the bar association. Mr. Howard said that only a small number of picketers would be there at the bank. Mr. Howard, Mr. Curtis and Mr. Oldham violated the court order. This matter will be taken up with the bar association. The court will enforce the order of the court."

8/31/63 Post-Dispatch—Millsap "flagrant violation of court order; Ray Howard misrepresented himself to the court."

9/12/63 KSD-TV—Millsap "We will not be coerced into hiring Negroes; we will work with the Mayor's Council on Human Relations." McConnell "People on picket line are not qualified."

10/11/63 Post-Dispatch, Globe-Democrat, Argus, American "Facts on Jefferson Bank and Fair Employment." This paid ad was published during the trial of Ford et al.

10/11/63 KMOX-TV-KSD-TV—Joint press conference with Millsap, Ross, and McConnell Persons on picket line were referred to as "animals".

10/15/63 KMOX-TV—Millsap "Bank has not refused to meet with anyone but will never meet with CORE." Other statements by McConnell and Ross.

10/27/63 Post-Dispatch, Globe-Democrat—Statement by John Shepherd, President of St. Louis Bar Association. "Contempt for the law and the courts breeds anarchy. No matter how distasteful to individual citizens, a judgment of a court having full jurisdiction must be obeyed. This is a basic tenet of our system of government. Lawyers as officers of the courts have a special duty to uphold judgments and urge compliance therewith.

"Any doctrine which is based on defiance of court orders can never be justified in our society, regardless of the end result sought by such defiance. Such orders are always subject to review by ordinary judicial processes.

"The Bar Association of St. Louis, composed of almost 2000 lawyers, believes firmly in the above principles and looks with dismay upon any efforts to subvert them."

et al. were led to believe that the charges were for civil contempt and thus were effectively deprived of their right not to testify against themselves. The right of an accused not to give evidence against himself is protected from state infringement by the Fifth and Fourteenth Amendments. **Malloy v. Hogan,** 378 U. S. 1; **Griffin v. California,** 380 U. S. 609.

It was after these depositions were taken that Millsap filed notices of criminal contempt.

As if these pre-trial tactics were not sufficient deprivation of petitioners' constitutional rights, Millsap introduced in evidence parts of the depositions as "admissions against interest" (Tr. C, 1128). Defense counsel objected to their admission but were overruled (Tr. C, 1135-44). Because of this adverse ruling petitioners were compelled to introduce the entire depositions in order to correct the factual distortions created by the admission of selected parts. Judge Scott clearly claimed the right to consider petitioners' involuntary statements in arriving at his judgment.[3]

It would be a gross understatement to assert that Millsap's conduct before, during and after the trials did not measure up to the best traditions of a lawyer advocate. About such matter Mr. Justice Sutherland had this to say in **Berger v. United States,** 295 U. S. 78, at page 88:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and

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[3] In Estes v. Texas, 85 S. Ct. 1628, Mr. Chief Justice Warren had this to say in a concurring opinion: "In Lyons v. Oklahoma, 322 U. S. 596, this Court held that if an involuntary confession is introduced into evidence the conviction must be reversed, even though there is other evidence in the record to justify a verdict of guilty."

whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is guilt shall not escape or innocense suffer. He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

CONCLUSION.

For the reasons herein set out petitioners urge this Court to grant this petition for certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A.

United States Court of Appeals
for the Eighth Circuit.

No. 18,011.

Louis Ford, et al., Appellants,

vs.

William Boeger, Warden St. Louis City Jail, Appellee.

No. 18,032.

Robert B. Curtis, et al., Appellants,

vs.

William Boeger, Warden St. Louis City Jail, Appellee.

No. 18,033.

Michela Grand, et al., Appellants,

vs.

William Boeger, Warden St. Louis City Jail, Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

[July 6, 1966.]

Before Van Oosterhout and Mehaffy, Circuit Judges, and Van Pelt, District Judge.

Van Oosterhout, Circuit Judge.

Before us are three consolidated appeals from denial by the United States District Court of petitions for writs of

habeas corpus. The petitioners challenge the validity of state convictions for criminal contempt and the resulting sentences imposed for violation of restraining order entered on August 30, 1963, requiring petitioners to desist and refrain from unlawfully interfering with the business of the Jefferson Bank and Trust Company by physically obstructing entrance and exit of customers or by preventing patrons usual access to tellers' windows and other departments of the bank. Peaceful picketing was not proscribed.[1]

Petitioners' convictions all arose out of asserted willful violations of such order. Each of the three cases before us involves separate and distinct violations of the restraining order occurring on different dates. Separate hearings were had with respect to each demonstration. Case No. 18,032 arose out of a demonstration at the bank on August 30, 1963. Petitioners found guilty in this respect, together with the sentences imposed, are:

Name	City Jail	Fine
Robert B. Curtis	270 days	$1,000.00
William L. Clay	270 days	1,000.00
Rev. Charles Perkins	180 days	500.00
Lucien Richards	90 days	500.00
Norman Seay	90 days	500.00

Case No. 18,011 arose out of the October 4, 1963, demonstration. The petitioners found guilty, and the sentences imposed, are:

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[1] The terms of the restraining order may be found in **Curtis v. Tozer**, 374 S. W. 2d 557, 563.

Name	City Jail	Fine
Louis Ford	One Year	$500.00
Taylor Jones	One Year	500.00
Benjamin Goins	180 days	500.00
Ian Grand	180 days	500.00
Mrs. Roberta Tournour	120 days	500.00
Kenneth Lee	60 days	500.00
Ronald Glenn	60 days	500.00

Case No. 18,033 arose out of the October 7, 1963, demonstration. The petitioners convicted, with the sentences imposed, are:

Name	City Jail	Fine
James Peake	One Year	$500.00
Micheala Grand	120 days	500.00
Danny Pollock	60 days	500.00

Petitioners in all of these cases filed petitions for writ of habeas corpus with the St. Louis Court of Appeals. They were given a full evidentiary hearing. Relief was denied all petitioners now before us.[2] The St. Louis Court of Appeals in a fifty-page opinion, **Curtis v. Tozer,** 374 S. W. 2d 557, fully and fairly sets out the facts, the issues raised and the basis of disposition of such issues.

Petitioners next applied to the Supreme Court of Missouri for habeas corpus relief. Said Court on January 31, 1964, in an unreported opinion, denied relief, stating:

> "Application for writ of habeas corpus denied because petition and exhibits filed, including transcript of evidence submitted by petitioners to this Court, fail to show a claim on which relief can be granted for the reasons stated in the opinion of the St. Louis Court of Appeals in the consolidated cases of: **In the**

[2] The St. Louis Court of Appeals discharged four petitioners not involved in these appeals upon the grounds of insufficiency of the evidence to establish their guilt.

Matter of Robert B. Curtis et al. v. Martin L. Tozer, Sheriff, et al., No. 31,777, **In the Matter of Louis Ford et al. v. Martin L. Tozer, Sheriff, et al.**, No. 31,778, and **In the Matter of Michela Grand et al. v. Martin L. Tozer, Sheriff**, No. 31,779 certified copy of which opinion this Court has procured on its own motion."

Petitioners next sought habeas corpus relief from the United States District Court. Such relief was first denied upon the ground that the petitioners had not exhausted their state remedies by reason of their failure to apply to the United States Supreme Court for certiorari. Upon appeal, we reversed and remanded. **Curtis v. Boeger**, 8 Cir., 331 F. 2d 675, stating:

> "[T]he court determines that appellants were not, as a prerequisite to a hearing upon the merits of their application, required to petition the Supreme Court of the United States for writ of certiorari and further determines that they have exhausted their state remedies within the teaching of **Fay v. Noia**, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837.
>
> "Accordingly, the orders appealed from should be and hereby are vacated and the causes are remanded to enable the District Court to consider the question on the basis of **Fay v. Noia**, supra, and to consider whether the issues sought to be raised are such as call for a hearing under **Townsend v. Sain**, supra." [372 U. S. 293.]

Upon remand, the District Court determined that the petitions presented only legal issues, that all fact issues had been fully tried and fairly determined by the state courts, and that no asserted federal constitutional rights of petitioners had been violated. The petitions were dismissed. **Ford v. Boeger**, 236 F. Supp. 831; **In Re Curtis' Petition**, 240 F. Supp. 475. These appeals are from such dismissals.

The legal issues presented by all petitioners are in substance the same. The errors relied upon as a basis for reversal may be summarized as follows:

I. Improper denial of an evidentiary hearing.

II. Lack of jurisdiction in the state court to issue the restraining order upon which the contempt convictions were based.

III. Procedures followed deprived plaintiffs of rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

IV. Conviction of contempt without benefit of jury trial constituted denial of due process.

V. The restraining order violates petitioners' right of free speech guaranteed by the First and Fourteenth Amendments.

VI. James Peake's punishment constituted cruel and inhuman punishment in violation of the Eighth Amendment.

VII. Other errors.

The facts bearing upon the issues before us are fully and fairly set out in the opinions of the St. Louis Court of Appeals and the District Court, heretofore cited. The demonstrations upon which the contempt convictions were based arose out of efforts of CORE to have the Jefferson Bank and Trust Company employ four negroes in clerical positions. The bank was advised that direct action would be taken against it if the requested positions were not made available. The bank replied it had no openings. The bank, acting upon information which it had obtained that CORE planned sit-ins, stand-ins and lie-ins at the bank on August 30, instituted an action in the state court for an injunction and restraining order. The order was served on most of the defendants before the August 30

demonstration and upon substantial evidence, the state court found that all participating petitioners had notice of the restraining order before the demonstration in which they participated. In the demonstrations, the petitioners blocked the entrance to the bank by standing in front of the entrance locking arms and blocked entrance to the tellers' windows by sitting and lying in front of such windows. While the demostrations were in progress, the restraining order was read by a bank official, the demonstrators were requested to leave and refused to do so.

We now proceed to the consideration of the errors raised.

I.

No error was committed in denying an evidentiary hearing. At a pretrial conference called to consider the necessity of an evidentiary hearing, petitioners limited their request to produce additional evidence to the following items: (1) The nature and extent of the alleged labor dispute between CORE and the bank. (2) Bias and prejudice on the part of special prosecutor Millsap. (3) Discriminatory hiring practices of the bank.

It appears that full opportunity was afforded in the state court to present evidence upon each of said points and no showing has been made that the proposed additional evidence would be material upon any controlling issue before us.

The trial court recognized that **Townsend v. Sain** requires an evidentiary hearing when material facts are in dispute. Judge Meredith, at p. 834 of 236 F. Supp., states that after reading petitioners' application and brief, it is his view that no facts are in dispute and that the dispute relates only to conclusions of law. We agree.

Even when facts are disputed, an evidentiary hearing is unnecessary where the state court after a full hearing

reliably found the relevant facts. **Townsend v. Sain**, 372 U. S. 293, 312-13. See **Case v. Nebraska**, 381 U. S. 336, 345, Justice Brennan concurring.

II.

Petitioners in support of their contention that the state court lacked jurisdiction to issue the restraining order urge that CORE is a labor organization and that the dispute between CORE and the bank is a labor dispute of a type with respect to which the federal government by means of the National Labor Relations Act, 29 U. S. C. A., § 151 et seq., has preempted the field. Inasmuch as we are of the view, as hereinafter set forth, that no preemption exists under the facts of this case, we shall in the interest of not unduly prolonging this opinion assume without so deciding that CORE is a labor organization and that the dispute is a labor dispute covered by the Act.

In **Weber v. Anheuser-Busch, Inc.**, 348 U. S. 468, 480-81, the Court states:

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in **Garner v. Teamsters Union**, *supra*. But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U. S., at 488. The penumbral area can

be rendered progressively clear only by the course of litigation. . . ."

To like effect, see **San Diego Unions v. Garmon**, 359 U. S. 236, 240-241; **International Association of Machinists v. Gonzales**, 356 U. S. 617, 619; **Garner v. Teamsters Union**, 346 U. S. 485, 488.

In **Allen-Bradley Local v. Wisconsin Employment Relations Board**, 315 U. S. 740, the Court held that the National Labor Relations Act did not preclude state action restraining mass picketing, obstructing entrance and egress from the employer's factory and obstructing public roads and threatening injury to employees desiring to work. The Court states:

> "We agree with the statement of the United States as *amicus curiae* that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity. The Committee Reports on the federal Act plainly indicate that it is not 'a mere police court measure' and that authority of the several States may be exerted to control such conduct. Furthermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.' . . ." 315 U. S. 740, 748-49.

In **Auto Workers v. Wisconsin Board**, 351 U. S. 266, the Court holds that subsequent amendments to the National Labor Relations Act have not impaired **Allen-Bradley** holdings. The general rule that state courts may not enjoin conduct which has been made an unfair labor practice is recognized. The Court goes on to say:

> "But our post-Taft-Hartley opinions have made it clear that this general rule does not take from the States power to prevent mass picketing, violence, and

overt threats of violence. The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence. This conclusion has been explicit in the opinions cited in note 12.

"The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling direction to that effect.

"We hold that Wisconsin may enjoin the violent union conduct here involved. . . ." 351 U. S. 266, 274-75.

Additional recognition of the right of a state to afford protection against union violence is found in **Teamsters Union v. Morton**, 377 U. S. 252, 257; **San Diego Unions v. Garmon**, 359 U. S. 236, 247; **Youngdahl v. Rainfair, Inc.**, 355 U. S. 131, 138-39; **Garner v. Teamsters Union**, 346 U. S. 485, 488.

Examination of the record before us shows that only violent conduct within the scope of matters left to state jurisdiction is here enjoined. Peaceful picketing is not proscribed. We agree with the conclusion of the St. Louis Court of Appeals upon this issue, thus stated: "As already indicated, violence, intimidation and similar acts may be restrained and enjoined even though they are threatened or committed in connection with a labor dispute." 374 S. W. 2d 557, 595.

Petitioners' reliance upon the Norris-LaGuardia anti-injunction Act, 29 U. S. C. A., § 101 et seq., is misplaced.

The Norris-LaGuardia injunction limitations are imposed only upon courts of the United States. The Court of Appeals for the Third Circuit in **American Dredging Co. v. Local 25**, 3 Cir., 338 F. 2d 837, 850-56, clearly and convincingly demonstrates why the prohibition applies only to federal courts—not to state courts.

An additional separate and independent basis exists for upholding the criminal contempt convictions. **United States v. United Mine Workers**, 330 U. S. 258, and cases cited therein, clearly hold that where a bona fide doubtful question of jurisdiction is presented, the trial court has a right to issue a restraining order to maintain the status quo while it is determining its own authority to grant injunctive relief. As a necessary consequence, the court has the power to punish the violation of a restraining order so made by contempt proceedings. The Court states:

> "Proceeding further, we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued. In **Howat v. Kansas**, 258 U. S. 181, 189-90 (1922), this Court said:
>
> > 'An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for

> error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.'
>
> Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, **Worden v. Searls**, 121 U. S. 14 (1887), or though the basic action has become moot, **Gompers v. Bucks Stove & Range Co.**, 221 U. S. 418 (1911)." 330 U. S. 258, 293-94.

See **United States v. Shipp**, 203 U. S. 563; **Carter v. United States**, 5 Cir., 135 F. 2d 858.

Similarly, in our present case the court issuing the restraining order had jurisdiction and at least a bona fide question exists on the court's right to issue the injunction sought. The court has power to preserve existing conditions while it is determining its own authority to grant injunctive relief.

In our present case, the record before us shows that the Circuit Court of St. Louis, after due notice to all parties and full hearing, granted a permanent injunction on December 6, 1963, enjoining substantially the same conduct prescribed by the restraining order. So far as we can ascertain, no appeal was taken from such order. The district court in the present case in its opinion correctly held, "The Court had jurisdiction over the subject matter and the parties and until reversal by orderly and proper proceedings, disobedience to the restraining order was subject to punishment for contempt." 240 F. Supp. 475, 482-83.

III.

Petitioners next urge that the proceedings followed in the state court deprived them of rights guaranteed by the Fifth, Sixth and Fourteenth Amendments. Under

this heading, they urge that they were deprived of a fair trial by reason of the following: (1) Petitioners in **Ford**, No. 18,011, were not allowed a reasonable time to prepare for trial. (2) Appointment of attroney Millsap as special prosecutor, and the prejudicial manner in which he conducted the proceedings. (3) Insufficient notice of nature of charges made. (4) Extensive adverse newspaper and radio publicity.

All of such contentions were fully heard and fairly considered by the St. Louis Court of Appeals as reflected by its opinion. Upon the basis of the record, such court was justified in determining that petitioners' constitutional rights were not violated in the respects claimed. The United States District Court hearing these cases was warranted in determining as it did that the petitioners had a fair trial and that their constitutional rights were not violated in the respects claimed.

The prejudicial publicity issue was not fairly raised either in the state court or in the federal district court. The contempt proceedings were tried to Judge Scott without a jury. It is not likely that an experienced judge will be influenced in his decisions by such publicity. The conclusions reached by the state trial court were supported by substantial evidence and it is difficult to see how the court could have fairly arrived at any other conclusions with respect to the guilt of contempt.

IV.

Petitioners urge that the substantial sentences imposed without benefit of a jury trial constitute a denial of due process under the Sixth, Eighth and Fourteenth Amendments. This contention was never raised in the state courts. 28 U. S. C. A., § 2254 specifically requires a state prisoner to exhaust all available state remedies before he can resort to federal habeas corpus relief. The Su-

preme Court in **Case v. Nebraska,** 381 U. S. 336, particularly in the concurring opinions, points out the desirability of minimizing the necessity for state prisoners to resort to federal habeas corpus and urges the prior utilization of available state procedure for testing claims of violation of federal constitutional rights.

In instances where adequate state procedures are available, this court has repeatedly held that the exhaustion of such state remedies is required before federal habeas corpus may be entertained. **Ellenson v. Fugate,** 8 Cir., 346 F. 2d 151; **Dabney v. Sigler,** 8 Cir., 345 F. 2d 710; **Witt v. Nash,** 8 Cir., 342 F. 2d 791; **Cyronne-DeVirgin v. State of Missouri,** 8 Cir., 341 F. 2d 568.

The **Witt** case, supra, arose out of a Missouri conviction. We there re-expressed our view that the Missouri Supreme Court Rule 27.26 is the substantial equivalent of 28 U. S. C. A., § 2255 and that it provides for a fair post-conviction review of federal constitutional violations charged in state trials resulting in conviction. We remanded with direction to the district court to dismiss the proceeding without prejudice to appellant's right to seek relief in the state court.

It is also a well-established principle of appellate review that generally issues not fairly raised in the trial court cannot be considered upon appeal. **Vincent v. United States,** 8 Cir., ... F. 2d ... (June 7, 1966); **Masters v. Eide,** 8 Cir., 353 F. 2d 517, 518; **Haynes v. Harris,** 8 Cir., 344 F. 2d 463, 466; **Sutton v. Settle,** 8 Cir., 302 F. 2d 286, 288; see **Yakus v. United States,** 321 U. S. 414, 444; **Whitney v. California,** 274 U. S. 357, 362-63; **Page v. United States,** 8 Cir., 282 F. 2d 807, 810.

Petitioners at the state court trial were represented by numerous competent counsel. At the time of the trial in 1963, no right to a jury trial in criminal contempt cases had been established. See **Green v. United States,**

356 U. S. 165, 186-87. Doubtless because of this state of the law, no jury trial was demanded.

United States v. Barnett, 376 U. S. 681, decided after denial of habeas corpus by the St. Louis Court of Appeals, and **Cheff v. Schnackenberg**, ... U. S. ..., decided June 6, 1966, indicate that a view has developed in the Supreme Court to the effect that a jury trial should be granted in criminal contempt cases in instances where substantial penalties are imposed. Contempt convictions were affirmed in each of these cases. Each case arose out of a federal contempt conviction. In **Cheff**, the Court after deciding the case before it goes on to say:

> "Therefore, in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts unless a jury trial has been received or waived. Nothing we have said, however, restricts the power of a reviewing court, in appropriate circumstances, to revise sentences in contempt cases tried with or without juries." ... U. S. ..., ...

Since the Court states the foregoing position is taken on the basis of its supervisory power over federal courts, not on the basis of violation of a constitutional right to a jury trial, it would appear that the pronouncement does not apply directly to state criminal contempt convictions. The last sentence of the pronouncement may indicate that a federal conviction without a jury can be validated by reduction of the sentence to six months or less. We find nothing in the cases just discussed which indicates the new policy is to be retroactively applied. Here the state convictions became final at least in 1964.

Inasmuch as the jury issue was not fairly presented either to the state court or the federal district court, no error was committed in not deciding such issue.

V.

Petitioners on brief here urge that the restraining order issued and the contempt convictions based thereon violate petitioners' right of free speech and assembly guaranteed under the First and Fourteenth Amendments. Defendant asserts that the issue of free speech and assembly was not raised in the state court or in the United States District Court. Petitioners have not answered this contention. Petitioners in the United States District Court did in very general and broad language assert violation of the First Amendment but the issue was not pressed in the district court nor was it passed upon. In our view, the issue was not fairly or adequately raised. Upon the basis of the authorities cited in the previous division, issues not raised in the state court cannot be pursued by a state prisoner in federal habeas corpus. In any event, we are satisfied for reasons hereinabove discussed, that petitioners conduct goes well beyond protected free speech. See **Pritchard v. Downie**, 8 Cir., 326 F. 2d 323.

VI.

In the cases before us for review, petitioners raise the issue that sentences imposed upon them were excessive and constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The sentences imposed were within the limits provided by the applicable Missouri statute, V. A. M. S., § 476.120. As properly pointed out in the trial court's opinion, p. 485 of 240 F. Supp., p. 834 of 236 F. Supp., state sentences authorized by statute are not subject to attack by federal habeas corpus.[3]

[3] At the time the sentences were imposed, the repetitive violent demonstrations created a situation which required effective state action to re-establish law and order. Looking at the situation in retrospect after a considerable lapse of time, some of the penalties may seem rather severe. Defendants, after serving

On this appeal, the only sentence attacked on the cruel and unusual punishment grounds is that of James Peake. Peake was sentenced to one year's imprisonment of which he has served some fifty-five days. It is undisputed that Peake is a paraplegic and that he cannot move without the aid of a wheel chair. Such physical condition is a factor which is entitled to consideration by the sentencing court and by prison officials. There is no record before us with respect to any undue hardship suffered by Peake in serving his sentence. Statements in brief without record support cannot be considered.

Should Peake be required to serve the balance of his sentence, we cannot assume that the Missouri courts and prison officials will not give proper consideration to his physical handicaps. In any event, we are of the view that Peake should exhaust state remedies available before seeking federal habeas corpus relief.

VII.

Other issues urged do not rise to the stature of federal constitutional rights. The issue of the validity of the bond filed presents only a question of contract interpretation and state law. The issue of whether some of the defendants were within the class of those restrained or whether they were guilty by reason of wrongfully and knowingly acting in collusion with those restrained was fairly tried and determined. The exhaustive opinion of the St. Louis Court of Appeals clearly reflects that full and fair consideration was given to all of petitioners' complaints and that no fundamental federally guaranteed constitutional rights were denied petitioners.

---

part of their sentences, have been released upon bail. We have determined that the sentences were constitutionally imposed and valid. We have no clemency powers. The power to reduce or suspend the sentences imposed lies with the appropriate Missouri courts and officials.

Petitioners have failed to establish that the United States District Court committed any error in denying their petitions for federal habeas corpus relief.

The judgments dismissing the petitions for writs of habeas corpus are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

United States Court of Appeals
For the Eighth Circuit.

September Term, 1965.

No. 18011

Louis Ford, et al., Appellants,

vs.

William Boeger, Warden,
St. Louis City Jail.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 18032

Robert B. Curtis, et al., Appellants,

vs.

William Boeger, Warden,
St. Louis City Jail.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 18033

Michela Grand, et al., Appellants,

vs.

William Boeger, Warden,
St. Louis City Jail.

Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellants for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

August 16, 1966

Order entered at direction.

Robert C. Tucker,
Clerk, U. S. Court of Appeals, 8th Circuit.

APPENDIX C.

In the Supreme Court of Missouri,
In Banc.

January 31, 1964.

In the Matter of: Robert B. Curtis, William L. Clay, Lucien Richards, Rev. Charles Perkins, and Norman Seay,

Petitioners,

v.

Martin L. Tozer, Sheriff of the City of St. Louis, and William Boeger, Warden of the Municipal Jail, City of St. Louis,

Respondents.

No. 50,596.

Application for writ of habeas corpus denied because petition and exhibits filed, including transcript of evidence submitted by petitioners to this Court, fail to show a claim on which relief can be granted for the reasons stated in the opinion of the St. Louis Court of Appeals in the consolidated cases of: In the Matter of Robert B. Curtis et al. v. Martin L. Tozer, Sheriff, et al., No. 31,777, In the Matter of Louis Ford et al. v. Martin L. Tozer, Sheriff, et al., No. 31,778, and In the Matter of Michela Grand et al. v. Martin L. Tozer, Sheriff, No. 31,779 certified copy of which opinion this Court has procured on its own motion.

Day-to-Day

.....

Henry I. Eager, Chief Justice.

APPENDIX D.

Testimony of Major Walter Eitzman, Scene Commander St. Louis Police Department, in the case of Curtis et al.

Page 411:

Q. Did you make any arrests out there, Major?

A. Not a one.

Q. Do you know whether or not any of the police officers made any arrests out there?

A. I know that none of them did.

Q. Did anybody request that you arrest anybody out there?

A. No, sir, they did not.

Q. None of the bank officials?

A. None of them.

* * *

Page 416:

Mr. Wilson: Did you observe any of the demonstrators after they came into the bank attempt to transact any business at the windows?

A. No, I did not. I don't know if they were demonstrators or not.

Page 416a:

Q. Did any of them attempt to get to the loan section of the bank?

A. No. No one attempted to go into the loan section.

Q. Did they attempt to get to any—behind the cages?

A. No, sir. No attempt.

Q. Could you see the stairway from where you were stationed leading upstairs to the mezzanine?

A. If I stood up, see, if I stood up I could see it.

Page 417:

Q. Did you see any of the demonstrators attempting to go in their, sir?

A. No, sir.

Q. Was there any physical property of the bank damaged by any of these demonstrators?

A. None that I know of. I haven't had a report of it.

Q. No report was made to you by any officers of the bank to the effect, is that right, sir?

A. That is correct.

Q. Did you hear any of them curse in the bank?

A. The demonstrators?

Q. Yes.

A. No, sir.

Q. Did you see any violence at all in the bank, sir?

A. None whatsoever.

* * *

Page 421:

Q. In your opinion, as a major in the police department of thirty-two years experience, would you say that there was sufficient police manpower out there to have controlled any situation that arose?

A. I would say definitely we could have handled anything that came up.

SUPREME COURT, U. S.

FILED

JAN 14 1967

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 870.

ROBERT B. CURTIS, WILLIAM L. CLAY, REV. CHARLES PERKINS, LUCIEN RICHARDS, NORMAN R. SEAY,

Petitioners,

vs.

WILLIAM BOEGER, Warden, St. Louis City Jail,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

THOMAS F. McDEVIT,
City Counselor,
City of St. Louis,

MERVIN J. GALLAGHER,
GARY M. GAERTNER,
ALLEN J. ROTH,
Associate City Counselors,
City of St. Louis,
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St. Louis, Missouri,
Attorneys for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 870.

ROBERT B. CURTIS, WILLIAM L. CLAY, REV. CHARLES PERKINS, LUCIEN RICHARDS, NORMAN R. SEAY,
Petitioners,

vs.

WILLIAM BOEGER, Warden, St. Louis City Jail,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

STATEMENT OF THE CASE.

Petitioners' Statement of the Case is so erroneous and misleading that Respondent is required to set forth his own Statement of the Case. Petitioner has filed no printed record but has filed the transcript of the state court proceedings.

Petitioner Curtis, at all times hereinafter mentioned, was the President of the St. Louis Committee of Racial Equality, commonly referred to as CORE.

On August 14, 1963, petitioner Curtis directed a letter to the Jefferson Bank and Trust Company, which he signed, "Chairman of CORE", which stated:

> "As a result of our conversation last week and the report given by Rev. Charles Perkins and me, the St. Louis Committee of Racial Equality voted to take direct action against Jefferson Bank if four full-time Negroes are not hired in clerical or teller positions within two weeks" (See Appendix A).

CORE held a meeting on Sunday, August 25, 1963, at which time the members voted to take "direct action" against the bank (Tr. 965). The decision of CORE was published in the daily newspapers. Petitioner Curtis, as president of CORE, announced that the direct action might consist of a sit-in, a stand-in, or a walk-in at the bank so as to interfere with the business of the bank.

On August 27, 1963, the bank rejected CORE'S demand that it hire four Negro employees as demanded by the Curtis letter. The bank's letter (Appendix B) stated that it did not need four additional employees; that it did not have applications from four qualified Negroes; that it was unwilling to discharge other employees to make room for four Negro employees, and that to do so would in itself be discrimination in violation of applicable law. This letter also pointed out that the bank officials had learned that CORE planned a sit-in, stand-in, and lie-in at the bank on Friday, August 30, 1963, and requested that CORE refrain from such action.

On August 29, 1963, the bank, in a verified petition, requested the Circuit Court of the City of St. Louis to issue a restraining order. Named as defendants were eleven individual defendants, including each of the petitioners herein, individually and as representatives of a class known as St. Louis Committee of Racial Equality.

The Honoroble Michael J. Scott, presiding judge of the division wherein the cause was assigned, while authorized to issue a temporary restraining order on a verified petition, *ex parte,* called Mr. Charles R. Oldham, an attorney and one of the named defendants, who appeared in Court on that date and, in a chambers conference on that date, entered his appearance in the suit on his own behalf and on behalf of several of the other named defendants. Mr. Oldham advised the Court that there was to be a meeting of CORE that evening and that he would relate to the members the fact that the bank had asked for a temporary restraining order and injunction, and that he would explain the legal significance of this action to the members of CORE. This he did (Tr. 1132). After hearing Mr. Oldham's explanation, the members of CORE at this meeting held on the evening of August 29, 1963, voted to blockade the bank (Tr. 1159).

Judge Scott, on being informed by Mr. Oldham in his chambers on August 29, 1963, that CORE was to have a meeting that evening and that Mr. Oldham would explain the pending suit wherein the Jefferson Bank and Trust Company had requested a temporary restraining order and injunction, deferred a decision on issuing the temporary restraining order until Friday, August 30, 1963, at ten o'clock A. M. On Friday, August 30, 1963, at ten o'clock A. M., Mr. Oldham again appeared accompanied by attorney Raymond Howard and informed Judge Scott that they could give no assurance to him that the action sought to be prevented by the suit would be avoided at a demonstration which had been scheduled to take place at the Jefferson Bank and Trust Company that afternoon at four o'clock P. M.

Judge Scott issued a temporary restraining order, restraining only unlawful interference with the business of the bank (Appendix C). No restraint was asked against peaceful picketing or any other free speech rights and no

restraint was imposed. The order issued by Judge Scott was handed to attorney Raymond Howard, who had entered his appearance for several of the named defendants, at 1:55 o'clock P. M., August 30, 1963. Prior to the issuance of the restraining order by the Court, Jefferson Bank and Trust Company was required to post a bond in the sum of Ten Thousand Dollars ($10,000.00) which was posted and approved by the Court prior to the issuance of the temporary restraining order.

The threatened actions restrained were set out in the temporary restraining order delivered to Mr. Howard as follows:

(a) "Physically hindering, obstructing, interfering with, delaying, molesting, or harassing other persons desiring to enter plaintiff's banking premises, from entering said premises for the purpose of conducting their business with plaintiff or for any other purpose."

(b) "Congregating or loitering individually or in groups inside plaintiff's banking premises and therein engage in any acts, or conduct of whatsoever character which interferes with, intimidates, harasses, hinders and annoys plaintiff's employees in the performance of their duties or other persons in the conduct of their business with plaintiff which in any way interferes with the proper and normal conduct of plaintiff's banking business."

(c) "Physically hindering, obstructing, interfering with, intimidating or in any other manner preventing customers or plaintiff and other members of the public from having the usual and customary access to teller's windows located in plaintiff's banking premises or access to any other department or portion of said banking premises wherein plaintiff conducts its banking business."

On the afternoon of August 30, 1963, at approximately four o'clock P. M., a crowd of more than one hundred persons under the direction of petitioner Curtis, assembled at the Wheatley Y. W. C. A. (Tr. 1148), and marched to the Jefferson Bank and Trust Company carrying placards, and sang and picketed around the bank until around 5:05 or 5:10 o'clock P. M., at which time a meeting was held on a parking lot adjacent to the bank premises (Tr. 1062), which was attended by each of the petitioners herein.

Petitioner Curtis presided at this meeting and introduced attorney Raymond Howard, who had been present in the Court on behalf of several of the petitioners early that same day and advised them of the issuance of the temporary restraining order and its legal significance. He urged them not to violate the restraining order because in so doing they would be subjecting themselves to possible fines and imprisonment (Tr. 1423). Petitioner Curtis then called for a show of hands of all those persons who were willing to violate the restraining order notwithstanding the possibility of punishment. All persons present raised their hands except attorney Raymond Howard who had advised against violating the restraining order (Tr. 1067). When the meeting dispersed following the vote, demonstrators went immediately to the doors of the bank and stood in front of the doors, linked arms, blocked egress and ingress of customers and employees of the bank, and sat in front of the doors of the bank with locked arms (Tr. 1070).

At 5:25 or 5:30 o'clock P. M., the demonstrators entered the bank. They milled around inside the bank (Tr. 45). They congregated in front of the teller's cages. They sang loudly and clapped hands in unison. They sat down and laid down on the floor of the bank. They refused to leave the bank.

While the demonstrators were inside the bank, an officer of the bank read the temporary restraining order to

the demonstrators who stopped their demonstration long enough to hear him read the order (Tr. 48), but after he read the order and asked them to leave (Tr. 511) the bank and they continued their demonstration and did not leave the bank.

At approximately 5:50 o'clock P. M., petitioner Curtis entered the bank, secured the demonstrators' attention and announced, "We will stay here until six o'clock and then we will go to the Wheatley Y. W. C. A." (Tr. 52). (Banking hours were from eight o'clock A. M. to six o'clock P. M. on the date in question.)

The record shows that each of the petitioners was served with a copy of the temporary restraining order prior to the time of their meeting on the parking lot; Clay (Tr. 1156); Curtis (Tr. 1176); Perkins (Tr. 1199); Richards (Tr. 1204), and Seay (Tr. 1171).

While the Court did issue a body attachment for the petitioners on August 31, 1963, following the aforedescribed demonstration at the bank, this attachment was effectively dissolved by the St. Louis Court of Appeals in its order granting a Writ of Habeas Corpus to the petitioners on September 3, 1963. This action is not referred to by the petitioners in their brief to the Court. The contempt trials of the petitioners were held pursuant to notice properly served on them in compliance with Missouri law on September 18, 1963. The trial of the petitioners was commenced on September 23, 1963, only after a plethora of competent counsel had entered their appearance on behalf of the petitioners and announced that they were ready for the trial. The trial of the petitioners took nine (9) days, and thirty-six (36) witnesses testified as to the conduct of the petitioners.

Petitioners, when requested whether or not they wished to present any evidence on their behalf, introduced into

evidence over the objections of the Special Prosecutor, depositions of the petitioners, which had been taken in the injunction suit subsequent to the issuance of the temporary restraining order and prior to the trial of the petitioners.

On October 24, 1963, the Honorable Michael J. Scott of the Circuit Court of the City of St. Louis, rendered judgment against the petitioners as follows:

SENTENCES.

Name	City Jail	Fine
Robert B. Curtis	270 days	$1,000.00
William L. Clay	270 days	$1,000.00
Rev. Charles Perkins	180 days	$ 500.00
Lucien Richards	90 days	$ 500.00
Norman Seay	90 days	$ 500.00

After judgment was pronounced by Judge Scott, the petitioners filed a Petition for Writ of Habeas Corpus with the St. Louis Court of Appeals. That Court made a review of the record of the trial Court including a considerable quantity of a television sound film which had been received in evidence in the trial Court. This Court made its own analysis of the conduct of the petitioners. **Curtis v. Tozer,** 374 S. W. 2d 557, pp. 578, 79 and 80. It then upheld the judgment of the trial Court against the petitioners. The decision of the St. Louis Court of Appeals was adopted by the Supreme Court of Missouri, *en banc,* on habeas corpus application filed with that Court by the petitioners (Petitioners' Appendix C).

Petitioners applied to the United States District Court, for the Eastern District of Missouri, Eastern Division, for a Writ of Habeas Corpus which was refused by that Court. **In re Curtis' Petition,** 227 F. Supp. 438. On an appeal which was expeditiously heard by the United States Court

of Appeals for the Eighth Circuit, that Court remanded to the District Court, "to consider whether the issues sought to be raised here are such as to call for a hearing. **Townsend v. Sain**, 372 U. S. 293," **Curtis v. Boeger**, 331 F. 2d 675.

After reviewing the record and hearing the arguments of counsel for the petitioners, the United States District Court for the Eastern District of Missouri, Eastern Division, Division Number 3, filed its opinion on March 31, 1965. **Curtis v. Boeger**, 240 F. Supp. 475. There was no evidentiary hearing. Petitioners' request for a review by this Court is for their conviction for criminal contempt in violating the temporary restraining order which was issued by the State Trial Court on August 30, 1963. Their participation was the first of what could fairly be characterized as three major demonstrations at the bank in violation of the restraining order on August 30, 1963, October 4, 1963 and October 11, 1963. Each demonstration resulted in a separate contempt trial of the participants which have been jointly reviewed by the Appellate Courts of Missouri and the United States District Court and the United States Court of Appeals for the Eighth Circuit. Appellants Louis Ford et al., in Case No. 18011 in the United States Court of Appeals for the Eighth Circuit (**Ford v. Boeger**, 362 F. 2d 999) failed to file a petition for Writ of Certiorari with this Court within the time allowed and have been ordered to surrender themselves to the United States Marshal for return to State authority (Appendix D). Appellants Michela Grand et al., in Case Number 18033 in the United States Court of Appeals for the Eighth Circuit, have filed a separate Petition for Writ of Certiorari with this Court which is docketed as No. 871, October term, 1966.

POINTS AND AUTHORITIES.

I.

Certiorari should be denied petitioners on their claim that the temporary restraining order which they were charged with disobeying is in violation of their first and fourteenth amendment rights.

Yakus v. U. S. (1943), 321 U. S. 414, 444;
Whitney v. California (1926), 274 U. S. 357, 362-63;
Ford v. Boeger (1966), 362 F. 2d 999, 1007;
Pritchard v. Downie (1964), 326 F. 2d 323.

II.

Certiorari should be denied petitioners because the United States Court of Appeals for the Eighth Circuit has correctly ruled that neither the National Labor Relations Act, 29 U. S. C. A., § 151 et seq., nor the Norris LaGuardia Act, 29 U. S. C. A., § 101 et seq., prevented the issuance by the state court of a temporary restraining order to prohibit the conduct complained of.

U. S. v. United Mineworkers of America (1947), 330 U. S. 258;
U. S. v. Shipp (1906), 203 U. S. 563;
Weber v. Anheuser-Busch, Inc. (1955), 348 U. S. 468, 480-81;
Allen-Bradley Local v. Wisconsin Employment Relations Board (1941), 315 U. S. 740;
American Dredging Co. v. Local 25 (1964), 338 F. 2d 837, 850-56; cert. den. 380 U. S. 935.

Statute.

Norris LaGuardia Act, 29 U. S. C. A., § 101 et seq.

III.

Certiorari should be denied petitioners on their claim of denial of sixth amendment rights in not having a jury trial for criminal contempt.

Cheff v. Schnackenberg (1966), 384 U. S. 373;
U. S. v. Barnett (1964), 376 U. S. 681;
Yakus v. U. S., supra;
Whitney v. California, supra.

IV.

Certiorari should be denied petitioners on their claim that the appointment of the bank's attorney as special prosecutor denied them their constitutional rights under the Fifth Amendment.

McCann v. New York Stock Exchange et al. (1935, C. C. 2d Cir.), 80 F. 2d 211;
Osborne v. Purdome (1952), 244 S. W. 2d 1005;
Ex parte Howell (1918), 273 Mo. 96, 200 S. W. 65;
Curtis v. Tozer (1964, Mo. App.), 374 S. W. 2d 557.

ARGUMENT.

I.

Certiorari should be denied petitioners on their claim that the temporary restraining order which they were charged with disobeying is in violation of their first and fourteenth amendment rights.

Petitioners make no showing to this Court that they ever raised any First Amendment claim in the District Court. The Court of Appeals held that this issue was not fairly or adequately raised, **Ford v. Boeger**, supra, 1007. Matters not fairly raised and considered in the trial court cannot be for the first time raised on appeal. **Yakus v. U. S.**, 321 U. S. 414, 444; **Whitney v. California**, 274 U. S. 357, 362-63.

The temporary restraining order which was served on each of the petitioners prior to the demonstration of August 30, 1963, was explained to them by their lawyer prior to their acts (Tr. 1423). The St. Louis Court of Appeals, in its opinion denying relief to the petitioners, had this to say about said explanation of the order:

> "The evidence is that Howard (their attorney) specifically explained that to block the doors, enter the bank and sit or lie in the bank, to sing or otherwise interfere with business of the bank was a violation of the restraining order." 374 S. W. 2d 557, 581.

The evidence shows petitioners actually voted to defy the restraining order with full knowledge of the possible consequences (Tr. 1067). The restraining order is set out herein as Appendix C. It contains no free speech limitations. The Court of Appeals properly held that petitioners' conduct was well beyond protected free speech. **Ford v. Boeger**, supra, 1007. See also **Pritchard v. Downie**, 326 F. 2d 323.

II.

Certiorari should be denied petitioners because the United States Court of Appeals for the Eighth Circuit has correctly ruled that neither the National Labor Relations Act, 29 U. S. C. A., § 151 et seq., nor the Norris-La Guardia Act, 29 U. S. C. A., § 101 et seq., prevented the issuance by the state court of a temporary restraining order to prohibit the conduct complained of.

Petitioners claim that as members of CORE which was demanding that a St. Louis, Missouri, bank employ four Negroes within two weeks on threat of "direct action" (Appendix A), they are exempt from the State Court action by the National Labor Relations Act, 29 U. S. C. A., § 151 et seq. This claim is not well founded.

While the Court of Appeals below assumed for the purposes of brevity in its opinion that CORE was a "labor organization" within the meaning of the Act, it properly decided the case without deciding this issue. CORE's demand on the Bank for the employment of four Negroes in two weeks was an illegal demand as was pointed out to CORE in the Bank's letter of August 27, 1963 (Appendix B), and judicially determined by the St. Louis Court of Appeals in its decision. **Curtis v. Tozer**, supra, p. 594, and the United States District Court in **In re Curtis' Petition**, supra, 457. Illegal demands have not received the protection of the pre-emption theory of the Act even when made by bona fide labor organizations. **Adams Dairy, Inc. v. Burke**, Mo. 1956, 293 S. W. 2d 281, cert. den. 352 U. S. 969.

This Court has frequently held that much authority is left to the states to prevent violence, intimidation, coercion and property damage when threatened by even a labor organization.

In **Weber v. Anheuser-Busch, Inc.**, 348 U. S. 468, 480-81, the Court states:

"By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been preempted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in **Garner v. Teamsters Union**, *supra*. But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much'. 346 U. S., at 488. The penumbral area can be rendered progressively clear only by the course of litigation . . ."

To like effect, see **San Diego Unions v. Garmon**, 359 U. S. 236, 240-241; **International Association of Machinists v. Gonzales**, 356 U. S. 617, 619; **Garner v. Teamsters Union**, 346 U. S. 485, 488.

In **Allen-Bradley Local v. Wisconsin Employment Relations Board**, 315 U. S. 740, the Court held that the National Labor Relations Act did not preclude state action restraining mass picketing, obstructing entrances and egress from the employer's factory and obstructing public roads and threatening injury to employees desiring to work. The Court states:

"We agree with the statement of the United States as *amicus curiae* that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity. The Committee Reports on the federal Act plainly indicate that it is

not 'a mere police court measure' and that authority of the several States may be exerted to control such conduct. Furthermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested'. . . ." 315 U. S. 740, 748-49.

The record in this case is clear. The activities sought to be restrained and prohibited are clearly within the scope of the authority of the state court to restrain and prohibit **even if** CORE occupied the status of "labor organization". The "labor dispute" pre-emption claim of the petitioners is wholly without merit.

Petitioners seem to believe that the cases where state action has been permitted in "labor disputes" is where violence occurred before the injunction was issued by the state court. While this is an easy criterion for a court to follow, it need not be the only one. The Court is entitled to issue its order to maintain the *status quo* while it determines its jurisdiction and authority and this order must be obeyed in the interim. He who fails to obey acts at his peril. **United States v. Shipp,** 203 U. S. 563; **United States v. United Mine Workers of America,** 330 U. S. 258.

Petitioners seem also to believe that their conduct in directing activities which prevented entrance and egress to the Bank by blocking doors and the blocking of the windows in the Bank did not warrant the state court from exercising its jurisdiction. Petitioners' charge that the Bank claimed an unfair labor practice under Section 8 of the Act is totally without record foundation or factual support. The Bank was seeking and obtained state court protection from the illegal interference with its business (see Appendix C).

Petitioners fail to recognize the state's primary responsibility to preserve law and order. That the Norris-

LaGuardia Act applies only to federal courts has been clearly established. **American Dredging Co. v. Local 25**, 338 F. 2d 837, 850-56; cert. den. 380 U. S. 935.

The Court of Appeals properly held that the state court had jurisdiction to maintain the *status quo* by the issuance of the restraining order prayed for by the Bank. Petitioners state that the Court below misapplied the doctrine of **U. S. v. Mineworkers**, *supra.* They cite for their authority **In Re Green's Petition**, 369 U. S. 689, and **Ex Parte George**, 371 U. S. 72. While they point out that the **Green** case involved a "labor dispute" they seem unaware that the undisputed facts in their case preclude any finding of a "labor dispute" and the courts have properly held that none exists. The **George** case merely holds that Texas law does not permit contempt convictions for violation of a temporary injunction when there is no jurisdiction in the issuing court.

It appears that Petitioners now attempt to obtain "labor organization" status for CORE. While this determination is not necessary to the determination of this case, it should be pointed out that at the time of the occurrence of the acts resulting in their conviction for criminal contempt, the City of St. Louis and the State of Missouri had Fair Employment Practices Acts and if petitioners really believed the charges they made against the Bank, they had adequate recourse through a legal administrative process established by the State of Missouri (Chapter 296, V. A. M. S.) and the City of St. Louis, Missouri (Ordinance 51512, November 29, 1962, Ch. 482, Revised Code, City of St. Louis). These procedures were never followed by the Petitioners. They chose to take the law into their own hands even when an adequate remedy existed for any legitimate grievances. They cannot now claim federal labor law protection for their unlawful acts.

III.

Certiorari should be denied petitioners on their claim of denial of sixth amendment rights in not having a jury trial for criminal contempt.

Petitioners claim denial of the Sixth Amendment right to trial by jury. They acknowledge that at no time did they request a jury trial. Only Petitioners Curtis and Clay received sentences beyond those considered "petty" by the Court in **Cheff v. Schnackenberg**, 384 U. S. 373. Each of them received sentences of 270 days in the City Jail. The Court of Appeals held that the **Cheff** case was based on the supervisory authority of this Court over the federal courts and not on the Sixth Amendment. There has been no known application of this limitation to state courts by the federal judiciary. Courts have traditionally been clothed with the contempt power so as to compel obedience to their lawful decrees and this power is applied with equal force to state governors and communists. **U. S. v. Barnett**, 376 U. S. 681; **Green v. U. S.**, 356 U. S. 164.

Petitioners make no showing that, even if the **Cheff** case should apply to state courts as a Sixth Amendment guarantee by way of the Fourteenth Amendment, it is retroactive. The **Cheff** case was not decided by this Court until July, 1966, and it is clear from the record that the judgments against the petitioners were final in 1963, or at the very latest at the time of the decision by the St. Louis Court of Appeals. **Curtis v. Tozer**, *supra*, at p. 557 (January 15, 1964).

The jury trial issue was not fairly raised or presented either in the state courts or in the District Court by the Petitioners. The Court of Appeals found and the record disclosed that Petitioners were represented by numerous competent counsel. **Ford v. Boeger**, *supra*, at p. 1007.

They cannot now raise the jury issue for the first time on appeal. **Yakus v. U. S.**, *supra*; **Whitney v. California**, *supra*. Furthermore, Petitioners have failed to show that this matter was timely raised as required by Supreme Court Rule 23.

IV.

Certiorari should be denied petitioners on their claim that the appointment of the bank's attorney as special prosecutor denied them their constitutional rights under the Fifth Amendment.

When the petitioners and others failed to obey the temporary restraining order issued by the state court, the judge appointed the Bank's attorney as a special prosecutor for the State of Missouri to present evidence of the violations. The Court of Appeals held that this matter was fairly heard and determined by the State Court on appeal although the trial court record is without a single objection to the Bank's lawyer presenting the evidence of contempt. It was only after the trials and convictions that Petitioners complained. As was pointed out by the opinion of the St. Louis Court of Appeals (**Curtis v. Tozer**, *supra*, at 584) it is the better practice to appoint the attorney for a party who has knowledge of the contempt. See also **McCann v. New York Stock Exchange, et al.** (C. C. 2d Cir.), 80 F. 2d 211, where Judge Learned Hand said:

> "* * * the court may proceed *sua sponte* without assistance of any attorney, as in the case of disorder in the courtroom; there can be little doubt about the kind of proceeding when that is done. But the judge may prefer to use the attorney for a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence. There is no reason why he should not do so, and every reason why he should; * * *."

Missouri law provides for the appointment of private attorneys for criminal contempt proceedings. **Osborne v. Purdome,** 224 S. W. 2d 1005; **Ex Parte Howell,** 200 S. W. 65.

The edited newspaper articles presented in footnotes were not presented to the District Court or the State Courts and cannot here be considered for the first time on appeal.

Petitioners also claim they were deprived of their 5th Amendment right not to testify against themselves as a result of the introduction into evidence of certain admissions made by them in depositions taken in the injunction proceeding and prior to the contempt trial. They fail to point out (1) they were represented at the depositions by several competent counsel and freely testified and (2) their counsel offered into evidence their entire depositions (Tr. 1550). They cannot find even a thin thread on which to tie this claim.

The unsupported claims of the petitioners cannot be relied on for relief. Direct evidence must be required. The record is silent because there is no support for the many groundless and imaginary claims lumped into this claim of constitutional unfairness.

CONCLUSION.

Petitioners fail to present any reasons why this Court should grant a review on writ of certiorari. They fail to state any important question of federal law which has not been but which should be decided by this Court. They fail to cite any departure from accepted judicial standards by a lower court which calls for the exercise of this Court's power. They fail to show that the State Courts decided any federal question in a way so as to conflict with any decision of this Court. They fail to show any federal court decision in this case which is in conflict with any decision of this Court. They fail to show that the Court of Appeals'

decision in any way conflicts with the decisions of any other Court of Appeals.

Petitioners failed to raise or fairly present the issues they now urge as the basis for seeking this Court's review.

Petitioners' convictions for criminal contempt by the State Court were based on state law. The procedures followed in obtaining these convictions complied in every respect with proper constitutional safeguards. There exists no grounds for the granting of a writ of certiorari and hence Petitioners' request should be denied.

Respectfully submitted,

THOMAS F. McGUIRE,
City Counselor,
City of St. Louis,
JAMES J. GALLAGHER,
GARY M. GAERTNER,
ALLEN J. ROTH,
Associate City Counselors,
City of St. Louis,
Room 234, City Hall,
St. Louis, Missouri,
Attorneys for Appellee.

APPENDIX A.

Cahill and Curtis, Attorneys at Law.
Clyde S. Cahill, Jr.
Robert B. Curtis
1204 Franklin Avenue
St. Louis 6, Missouri
Telephone CHestnut 1-5939

August 14, 1963

Mr. Harold Booker
Assistant Auditor
Jefferson Bank & Trust Company
Jefferson and Washington Blvd.
Saint Louis, Missouri

Dear Mr. Booker:

As a result of our conversation last week and the report given by Rev. Charles Perkins and me, the Saint Louis Committee of Racial Equality voted to take direct action against Jefferson Bank if four full time Negroes are not hired in clerical or teller positions within two weeks.

We feel that this action would be justified because of the discriminatory hiring policy practiced by Jefferson Bank over the years. This situation has been further aggravated by the usage of your faculties by a large number of Negroes.

Should you decide to comply with the above mentioned request, CORE would appreciate receiving a report on the progress you have made in hiring Negroes on a quarterly basis.

Sincerely yours,
/s/ Robert B. Curtis,
Chairman of CORE.

RBC/jt

APPENDIX B.

Law Offices
Goodbar, Ferriss, Casserly & Millsap
Saint Louis (1)

August 27, 1963

63101

Mr. Robert B. Curtis
Chairman of CORE
1204 Franklin Avenue
St. Louis 6, Missouri 63106

Re: Jefferson Bank and Trust Company

Dear Mr. Curtis:

This will acknowledge receipt of your letter of August 14, 1963 directed to the Jefferson Bank and Trust Company. Your letter has been referred to my attention.

The request of your organization that the Jefferson Bank and Trust Company employ four Negroes in clerical or teller positions by August 28, 1963 cannot be honored for the following reasons:

(1) The requirements of the bank are not such, at the present time, that four additional employees are needed to perform the work of the bank.

(2) The bank does not have applications for employment from four Negroes who are qualified to perform bank employment.

(3) The bank is unwilling to hire employees which are not needed at the bank or to discharge present competent

employees for the purpose of employing four Negroes in clerical or teller positions.

(4) The demands of your organization are in violation of the Fair Employment Practices Act which has been adopted by the City of St. Louis and the State of Missouri in that you are asking the bank to discriminate in its employment practices in favor of Negroes.

(5) The unwarranted charge by your organization that the Jefferson Bank and Trust Company has been discriminating in its employment practices, when in fact this bank has always given full consideration to the employment of qualified Negroes.

(6) The St. Louis Commission on Equal Opportunities has been recently established and should be given an opportunity to deal with the problem of job opportunities for Negroes. The bank and all reasonable employers in St. Louis will be strongly influenced by the recommendations of the Commission.

The bank has now been informed, through the local press, that your organization intends to take "direct action" against the Jefferson Bank from 4:00 to 6:00 p. m. on Friday, August 30th. This "direct action" has been described by you to include sit-ins, stand-ins and lie-ins which may interfere with the conduct of the business of the bank during critical hours of its operation.

The Jefferson Bank and Trust Company cannot accept the demands you have put upon it and cannot approve the action you suggest taking against it on Friday, August 30th. I therefore urge you, in the interest of the entire Negro community, to reconsider the position your organization has taken concerning the Jefferson Bank and Trust Company and cancel the demonstration you have planned at the bank on Friday, August 30th. The demonstration

you propose may impede the progress which is being made toward obtaining equal job opportunities for Negroes in the St. Louis area.

Yours very truly,

/s/ Wayne L. Millsap,
Attorney for Jefferson Bank
and Trust Company.

WLM:bse

cc: CORE, 3501 Easton Avenue
Mrs. Charles Oldham, 5227 Westminister Place
Mr. J. H. McConnell, Jefferson Bank

APPENDIX C.

In the Circuit Court of the City of St. Louis,
State of Missouri.

Jefferson Bank and Trust Company,
a Corporation,
Plaintiff,
v.
Robert B. Curtis et al.

Cause No. 57945.
Div. No. 2.

Temporary restraining order ordered to issue as to all defendants individually and as representatives of a class known as St. Louis Committee of Racial Equality from:

(a) Physically hindering, obstructing, interfering with, delaying, molesting or harassing other persons desiring to enter plaintiff's banking premises, from entering said premises for the purpose of conducting their business with plaintiff or for any other purpose.

(b) Congregating or loitering individually or in groups inside plaintiff's banking premises and therein engage in any acts or conduct of whatsoever character which interferes with, intimidates, harasses, hinders and annoys plaintiff's employees in the performance of their duties or other persons in the conduct of their business with plaintiff or which in any way interferes with the proper and normal conduct of plaintiff's banking business.

(c) Physically hindering, obstructing, interfering with, intimidating or in any other manner preventing customers or plaintiff and other members of the public from having the usual and customary access to tellers' windows located in plaintiff's banking premises or access to any other department or portion of said banking premises wherein plaintiff conducts its banking business.

It Is Further Ordered that, until the hearing of said motion and order therein, the defendants do absolutely desist and refrain from:

(a) Physically hindering, obstructing, interfering with, delaying, molesting or harassing other persons desiring to enter plaintiff's banking premises, from entering said premises for the purpose of conducting their business with plaintiff or for any other purpose.

(b) Congregating or loitering individually or in groups inside plaintiff's banking premises and therein engage in any acts or conduct of whatsoever character which interferes with, intimidates, harasses, hinders and annoys plaintiff's employees in the performance of their duties or other persons in the conduct of their business with plaintiff or which in any way interferes with the proper and normal conduct of plaintiff's banking business.

(c) Physically hindering, obstructing, interfering with, intimidating or in any other manner preventing customers of plaintiff and other members of the public from having the usual and customary access to tellers' windows located in plaintiff's banking premises or access to any other department or portion of said banking premises wherein plaintiff conducts its banking business.

It Is Further Ordered That Plaintiff post bond in the sum of Ten Thousand Dollars ($10,000).

Defendants ordered to show cause in Division 2 of the Circuit Court of the City of St. Louis, Missouri, on Thursday, September 26, 1963, at ten o'clock a. m., why a temporary injunction should not be granted as prayed.

/s/ Michael J. Scott.

APPENDIX D.

United States District Court, Eastern District of Missouri, Eastern Division.

Louis Ford, Ian Grand, Benjamin Goins, Roberta Tournour, Taylor Jones, Kenneth Lee, and Ronald Glenn,

Petitioners,

vs.

William Boeger, Warden, St. Louis City Jail,

Respondent.

No. 64 C 53(2).

Order.

It appearing to the Court that each of the petitioners in this cause have hithertofore received sentences for contempt of court in the Circuit Court of the City of St. Louis, Honorable Michael J. Scott, Judge, and that no relief was granted from their sentences by the St. Louis Court of Appeals, the Supreme Court of the State of Missouri, the United States District Court for the Eastern District of Missouri, and the United States Court of Appeals for the Eighth Circuit; it further appearing that the mandate of the United States Court of Appeals for the Eighth Circuit was issued on December 20, 1966; it further appearing that the petitioners were confined in the City Jail of the City of St. Louis, pursuant to sentence of the Circuit Court of the City of St. Louis, and were released on bail on March 2, 1964, pursuant to order of the United States Court of Appeals for the Eighth Circuit, and that the United States Court of Appeals for the Eighth Circuit has directed this Court to make such or-

ders as may be necessary to compel the surrender of the petitioners so that they may be placed in the hands of the appropriate authorities of the State of Missouri for the completion of the sentences imposed upon them; now, therefore,

It Is Hereby Ordered that the petitioners and each of them shall surrender themselves to the United States Marshal for the Eastern District of Missouri at the United States Court-House and Custom House, 1114 Market Street, St. Louis, Missouri, on January 16, 1967, at 10:00 a. m.

It Is Further Ordered that the United States Marshal shall deliver the petitioners, after their surrender, forthwith to the Warden of the City Jail of St. Louis, Missouri, for the completion of their sentences heretofore imposed.

Dated this 21st day of December, 1966.

/s/ James H. Meredith,
United States District Judge.

SUPREME COURT, U. S.

DEC 16 1966

JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 871

MICHAELA GRAND, DANIEL POLLOCK and JAMES PEAKE, JR.,
Petitioners,

vs.

WILLIAM BOEGER, Warden, St. Louis City Jail,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. .....

MICHAELA GRAND, DANIEL POLLOCK and JAMES PEAKE, JR.,
Petitioners,

vs.

WILLIAM BOEGER, Warden, St. Louis City Jail,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals for the Eighth Circuit.

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause July 6, 1966, infra, p. 15, rehearing denied August 16, 1966, infra, p. 32.

CITATIONS TO OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 362 Fed. 2d 999 (1966), and is printed in the appendix hereto, infra, p. 15. The opinion of the United States District Court for the

Eastern District of Missouri is reported at 340 F. Supp. 475. The decision of the Supreme Court of Missouri is unreported, but is printed in the appendix hereto, infra, p. 35. The opinion of the St. Louis Court of Appeals of the State of Missouri is reported at 374 S. W. 2d 557 (1964).

JURISDICTION.

The judgment of the United States Court of Appeals was entered July 6, 1966, infra, p. 15. Motion for rehearing was denied by the Eighth Circuit, August 16, 1966, infra, p. 32. Petitioner's time for filing petition for writ of certiorari was extended to and including December 16, 1966, by an order signed by Mr. Justice White on November 12, 1966.

The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1), petitioners having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED.

1. Whether petitioners were denied fundamental federally guaranteed constitutional rights when they were convicted of criminal contempt for violating an injunction to which they were not parties, privies or members of the class enjoined?

2. Whether petitioners were fairly tried and convicted of wrongfully acting in collusion with parties to the injunction proceeding when they were not charged with collusion nor was any substantial evidence of collusion presented to the court?

3. Whether petitioners' rights under the First Amendment were infringed and whether State jurisdiction was preempted because of a labor dispute involving unfair

labor practices and whether sentences imposed without jury trial were constitutionally permissible. All of which are fully set out in companion case of Curtis et al. v. Boeger, and incorporated herein by this reference.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

TRANSCRIPT REFERENCES.

The transcript references are as follows: (Tr. C) refers to transcript in state trial of Curtis et al; (Tr. G) refers to transcript in state trial of Grand et al. These cases were combined in the U. S. Court of Appeals but separate petitions for writ of certiorari have been filed.

STATEMENT OF THE CASE.

A. **General Background.** These cases involve judgments of contempt adjudicated against petitioners by the Circuit Court of the City of St. Louis, State of Missouri, arising out of a protest demonstration against the diseriminatory employment policies of the Jefferson Bank and Trust Company contrary to an *ex parte* injunction issued against certain individuals and the St. Louis Committee of Racial Equality. The Court in the *ex parte* injunction ordered certain defendants individually and as representatives of a class known as the St. Louis Committee of Racial Equality (CORE) from "physically hindering, obtructing, interfering with" other persons desiring to enter plaintiff's bank and from "congregating or loitering individually or in groups inside plaintiff's banking premises" and engaging in any acts which "interferes with, intimidates, harasses, hinders and annoys plaintiff's employees," etc.

Petitioners in this cause were not named as defendants nor were they members of the class enjoined by the order of the Court.

The St. Louis Committee of Racial Equality, commonly referred to as CORE, is a branch of the national organization known as the Congress of Racial Equality. In 1961 St. Louis CORE set up a special committee for the purpose of negotiating with banks in the City of St. Louis. During the period from 1961 to August, 1963 no progress had been made at the Jefferson Bank and on August 14, 1963, St. Louis CORE sent a letter to the Bank asking the bank to hire four Negroes in teller or clerical positions within two weeks (Tr. C, 10, 11). The bank replied with a written communication denying the request (Tr. C, 17, 18). On Sunday, August 25, 1963, the CORE group voted to take direct action against the bank on Friday, August 30, 1963 (Tr. C, 663).

On Thursday, August 29th, the Jefferson Bank filed its petition for an injunction in the Circuit Court of the City of St. Louis and applied for a temporary restraining order against certain named individuals and St. Louis CORE. On Friday, August 30, 1963 at 1:55 p. m. the St. Louis Circuit Court issued an *ex parte* injunction. That same afternoon St. Louis CORE held the demonstration at the bank and eight of the individually named defendants and their attorney were subsequently charged with violating the court order and convicted of contempt. Their trial began September 3, 1963 and concluded on Thursday, October 3rd. The defendants in that proceeding were directed to appear before the Court on October 25th for the decision and judgment of the Court.

On Friday, October 4, 1963, at about 5:00 p. m. some fifteen persons participated in a demonstration at the Jefferson Bank and Trust Company and were arrested on charges of trespassing and peace disturbance and subse-

quently charged with violation of the injunction issued by the Court. Their trial began at 8:30 p. m. on Friday, October 4 or 10:00 a. m. Monday, October 7. These were the petitioners in the case of Ford et al.

B. Matters leading to charges of violation of the ex parte restraining order against these appellants.

On Monday, October 7, the plaintiff bank made elaborate preparations and plans for handling demonstrations. Such plans consisted in part of stationing bank employees at each door of the bank to admit only selected persons (Tr. G, 143, 144), and of setting up a special facility at teller's window 10 for making change at a service charge of twenty-five cents per transaction (Tr. G, 69, 70, 93, 94).

Petitioners in Grand, et al., were admitted to the bank on the afternoon of October 7, 1963, by the bank employees or guards posted at the doors (Tr. G. 200). Petitioner Grand went to the change window and after she had been there for a short time she was asked to leave by a police officer and when she failed to do so was placed under arrest (Tr. G. 23, 24, 25). Petitioner Pollock went to the change window and was arrested when he refused to leave (Tr. G. 177, 178, 179). Petitioner Peake was first denied admission to the bank (Tr. G. 223), and then was admitted (Tr. G. 224). Peake then went to the change window, made some change, and went outside the bank (Tr. G. 186, 187). Peake later returned to the bank and was arrested after he had been interviewed by some reporters. During the testimony of Mr. Dillon Ross, President of the bank, the following appears in the transcript (Tr. G. 111, 112):

> Miss Younge: Was James Peake, at the time you were talking to him and at the time that you asked that he be arrested, doing anything but sitting in the bank in the middle of the lobby in his wheelchair?

A. Was he doing anything?

Q. Was he doing anything?

Q. Else, yes.

A. Well, I testified that——

Q. Sir, would you answer the question?

A. He was sitting in his wheel chair, yes.

Q. And was he—the question is whether he was doing anything else besides sitting in his wheel chair in the center of the lobby of the bank?

The Court: At what time?

Miss Younge: At the time you asked him to be arrested.

A. No, he was doing nothing else.

Q. And prior thereto, had he just come into the bank for the second time?

A. Yes. I testified he came into the bank the second time.

Q. And when he was wheeled into the center of the lobby, it was at this time that an arrest ensued?

A. Correct.

Q. He was not at that time blocking the doors of the bank, was he?

A. No.

Q. He was not at that time sitting on the floor of the bank, was he?

A. No.

Q. He was not at that time singing?

A. No.

Q. He was not chanting?

A. No.

Q. He was not at that time blocking any tellers' windows?

A. No.

All petitioners were charged with peace disturbance and trespass and while they were in the custody of the police, the bank attorneys filed a motion for the issu-

ance of an attachment against the petitioners which was granted by the Court (Tr. G. 1, 2, 3). The petitioners were brought before the Court and the Court read notice of the charges against them (Tr. G. 8, 9, 10).

The notice did not contain any charge that petitioners were acting in concert with and aiding or abetting one or more of the defendants named in the original injunction suit. Petitioners entered a plea of not guilty and were admitted to bail and trial was set for October 10, and then continued to October 14. The trial was concluded October 16, and petitioners were directed to return on October 25 to receive the decision and judgment of the Court (Tr. G. 383). On October 25 the Court entered similar findings as to each petitioner and in said findings of fact and judgment found that petitioners, "with actual notice as aforesaid, and **acting in concert and participation with and aiding and abetting one or more of the persons named as defendants in the aforesaid Jefferson Bank and Trust Company v. Robert Curtis, et al.**, did wilfully disobey and violate said Restraining Order by: . . ." (emphasis ours) (Tr. G. 397, 407, 417).

James Peake, the paraplegic, was sentenced to one year in the city jail and fined $500. Danny Pollock was sentenced to 60 days in the city jail and fined $500, and Michaela Grand was sentenced to 120 days in the city jail and fined $500.

C. How the Federal Questions Were Raised and Decided Below.

After the sentences and fines were imposed the petitioners were committed to the City Jail and denied bond pending appeal on the grounds that no appeal lies from a conviction of criminal contempt. On October 29, a Writ of Habeas Corpus was filed with the St. Louis Court of Appeals on behalf of these petitioners and on November 1, they were admitted to bail. The St. Louis Court of

Appeals combined the cases of Curtis, et al., Ford, et al., and Grand, et al., and on January 15, 1964, issued its order discharging some alleged contemnors in the case of Curtis, et al., and quashed the writs as to these petitioners. Curtis v. Tozer, 374 S. W. 2d 557.

Petitioners then filed an application for writ of habeas corpus in the Supreme Court of Missouri which was denied by said Court without a hearing and in an unreported memorandum decision (appendix, infra, p. 35). Subsequently, an application for writ of habeas corpus was filed in the United States District Court of Missouri, Eastern Division. Thereafter, the District Court denied the writs on the grounds that petitioners had not exhausted all state remedies. Petitioners appealed to the Eighth Circuit Court of Appeals and the Eighth Circuit determined that appellants had exhausted their state remedies and ordered the District Court to consider whether the issues sought to be raised required an evidentiary hearing. Petitioners were admitted to bail pending judgment on the applications for writ of habeas corpus. The District Court determined that an evidentiary hearing was not necessary and denied the writs. Grand v. Boeger, 340 F. Supp. 475. An appeal was perfected to the Eighth Circuit Court of Appeals. On July 6, 1966, the Eighth Circuit denied the applications for writ of habeas corpus and motion for rehearing was denied on August 16, 1966. Petitioners' time for filing petition for writ of certiorari was extended to and including December 16, 1966, by order of Mr. Justice White entered November 12, 1966.

Petitioners presented and preserved among other points, the following 14th Amendment due process issues and questions at each level of the proceedings in both state and federal courts:

a. Contention that petitioners were not within the class restrained.

b. Contention that petitioners were not charged with knowingly and wrongfully acting in collusion with those restrained, and that there was no evidence to support such a finding.

The Eighth Circuit Court of Appeals held, "The issue of whether some of the defendants were within the class of those restrained or whether they were guilty by reason of wrongfully and knowingly acting in collusion with those restrained was fairly tried and determined . . . no fundamental federally guaranteed constitutional rights were denied petitioners." Grand, et al., v. Boeger, 362 Fed. 2d 999, appendix, infra, p. 18.

The Federal District Court held that these issues did not rise to the stature of federally protected rights and the St. Louis Court of Appeals determined that there was sufficient evidence that petitioners had notice of the injunction and that a person who has notice of an injunction can be held in contempt if he violates the injunction.

REASONS FOR GRANTING THE WRIT.

I.

Certiorari Should Be Granted to Review the Holding That Petitioners Were Not Denied Any Fundamental Federally Guaranteed Constitutional Rights When They Were Convicted of Violating an Injunction to Which They Were Not Parties, Privies or Members of the Class Enjoined.

A person must be a party or in privity with a party in order to be bound by an injunction or any other judgment in personam.

On October 25, 1963, the Circuit Court of the City of St. Louis found these petitioners guilty of criminal contempt of court for violating an ex parte injunction issued

on August 30, 1963, against Robert B. Curtis, William L. Clay, Charles R. Oldham, Lucien Richards, Richard Daly, Walter Hayes, Rev. Charles Perkins, Norman Seay, Herman Thompson, Melvin West, individually and as representatives of a class known as St. Louis Committee of Racial Equality (Tr. G. 397-417). These petitioners were neither parties to the injunction suit or members of St. Louis CORE. It was never alleged nor did the Court make a finding of fact that these petitioners were members of CORE or parties to the restraining order.

Courts have no power to affect the legal relationships of persons not parties to an action or in privity with parties and a decree issued against one over whom the court lacks jurisdiction is of no effect. Harris v. Hardeman, 14 Howard 334, Hansberry v. Lee, 61 S. Ct. 115. It is apparent that petitioners were not bound by the injunction issued by the St. Louis Circuit Court because they were not parties to the decree.

A judgment of a state court if obtained without due process over defendants in personam may be collaterally attacked either defensively or agressively. Essanay Film Mfg. Co. v. Kone, 42 S. Ct. 318, Kilbourn v. Thompson, 103 U. S. 168, Hansberry v. Lee, supra. Therefore a judgment affecting individual rights is always open to inquiry where the judgment is relied on in any other proceeding. This doctrine applied to injunctions and contempts of court based on violation of an injunction. Judge Learned Hand for the court in Alemite Mfg. Corp. v. Staff, 42 F. 2d 832, voided a judgment wherein a stranger was convicted of contempt for violating an injunction to which he was not a party. The Court said at page 833:

> "On the other hand no Court can make a decree which will bind anyone but a party; a court of equity is as much so limited as a court of law; it cannot lawfully enjoin the world at large no matter how broadly it words its decree."

An injunction may not be enforced in state or federal courts against those who are not parties thereto. Scott v. Donald, 165 U. S. 107. Regal Knitwear Co. v. NLRB, 65 S. Ct. 478. In the Regal Knitwear case the court said at page 481:

> "The courts nevertheless may not grant enforcement order or injunction so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law."

Petitioners in this case were not parties to the injunction nor members of CORE and therefore were not bound by the injunction issued in Jefferson Bank and Trust Company v. Curtis et al. If these petitioners are to be held at guilty of contempt of court it must be on some theory other than that they were bound by the injunction and violated it.

II.

Certiorari Should Be Granted to Review the Holding That Petitioners Were Fairly Tried and Convicted of Wrongfully Acting in Collusion With Parties to the Injunction Proceeding When They Were Not Charged With Collusion Nor Was Any Substantial Evidence of Collusion Presented to the Court.

Petitioners contend that they were denied due process when they were convicted of criminal contempt based on a finding that they "acted in concert and participation with, and aided and abetted one or more defendants" when they were never charged with acting in concert and participating with, and aiding and abetting one or more of the defendants in the injunction suit and no substantial evidence was adduced to support such a finding.

There was no evidence introduced into court that petitioners were members of the class restrained and they

obviously were not named as defendants. Petitioners testified that they were not members of CORE.

It is a generally accepted rule of law that a stranger or a person not bound by an injunction may be convicted of contempt of court if he aids or acts in concert with one who is bound by the injunction. Ex parte Lennon, 166 U. S. 548; United Pharmacal Corp. v. United States, 306 F. 2d 515; Alemite Mfg. Corp. v. Staff, supra. In United Pharmacal Corp. v. United States the court said at pages 517, 518:

> "The question is whether United and its officers aided and abetted Melabolic in violating the preliminary injunction for as the late Judge Learned Hand pointed out in Alemite Mfg. Corp. v. Staff, 42 F. 2d 832 (C. A. 2, 1930), 'the only occasions when a person not a party may be punished is when he has helped to bring about not merely what the decree has forbidden, because it may have gone too far, but that it has the power to forbid, an act of a party. This means that the respondent must either abet the defendant (i. e., the person enjoined) or must be legally identified with him.' Wherefore as Judge Hand went on to point out, if the person enjoined is not involved in the contempt, an employee, and by the same token one in active concert or participation cannot be either, because the decree has not been violated. The reason for this is clear: '. . . for it is not the act described which the decree may forbid, but only that act when the defendant does it.' "

It should be noted that on October 7, 1963, when Petitioners were cited for contempt, none of the defendants in Jefferson Bank v. Curtis et al. were accused of violating the injunction on either of those two days. It is true that eight persons plus their attorney were cited on August 30, but there was no connection between the two cases and no complicity was alleged. The trial court in its Findings

of Fact and Judgment, ruled that petitioners acted in concert with Curtis et al. This ruling was made even though all the evidence showed that these petitioners acted independently of Curtis et al. and at different times. There were no allegations of this nature contained in the notice read to petitioners (Tr. G, 8h, 8i, 8j). In its Findings of Fact and Judgment the Court found that each petitioner, ". . . acted in concert and participation with, and aided and abetted one or more of the persons named as defendants in the aforesaid Jefferson Bank and Trust Co. v. Robert Curtis et al. . . ."

Petitioners were found guilty of aiding and abetting violations of the restraining order but were never accused of doing so. Petitioners did not have an opportunity to defend against that specific finding of fact since it was not alleged. Even in the Finding of Fact and Judgment the petitioners were not informed of the name or the identity of the persons they are supposed to have aided and abetted or the manner in which the enjoined persons acted in concert with them. Nor is any explanation given as to how these petitioners could be guilty of aiding and abetting when none of the persons bound by the injunction was accused of violating the injunction on October 7.

The right to know what one is charged with applies to cases of criminal contempt; therefore an alleged contemnor is entitled to a notice which fairly and fully informs him of the specific acts of contempt which he is charged. G. v. Souder, Mo. App., 305 S. W. 2d 883; U. S. v. Cruikshank, 92 U. S. 542; Gompers v. Buck's Stove, etc., Co., 221 U. S. 446.

A notice in criminal contempt is insufficent as a matter of law if it does not allege how the alleged contemnor acted in concert and participated with the enjoined defendants in violation of the restraining order. **United States v. Dean Rubber Mfg. Co.**, 71 F. Supp. 96, these

standards of due process apply to the states. In re Oliver, 222 U. S. 257; In re Green, 369 U. S. 689.

In the instant case the petitioners were never accused of acting in concert with any of the defendants (individuals or members of the class) therefore the notice was fatally defective and the procedures used to convict these petitioners violated their rights to due process under the 14th Amendment of the Federal Constitution.

There was no evidence that these petitioners were in any way connected to any of the named defendants. The only evidence presented was that there was a picket line in process at the time these petitioners entered the bank, and some persons in the picket line were carring CORE signs—there was also evidence that Lucien Richards and Rev. Charles Perkins (named defendants in the injunction) were in the picket line, but no evidence was introduced that would support a finding of conspiracy or collusion with any named defendant. To convict without evidence in support thereof violated due process under the 14th Amendment. Thompson v. City of Louisville, 80 S. Ct. 624.

CONCLUSION.

It is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

APPENDIX A.

United States Court of Appeals
for the Eighth Circuit.

No. 18,011.

Louis Ford, et al., Appellants,

vs.

William Boeger, Warden St. Louis City Jail, Appellee.

No. 18,032.

Robert B. Curtis, et al., Appellants,

vs.

William Boeger, Warden St. Louis City Jail, Appellee.

No. 18,033.

Michela Grand, et al., Appellants,

vs.

William Boeger, Warden St. Louis City Jail, Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

[July 6, 1966.]

Before Van Oosterhout and Mehaffy, Circuit Judges, and Van Pelt, District Judge.

Van Oosterhout, Circuit Judge.

Before us are three consolidated appeals from denial by the United States District Court of petitions for writs of

habeas corpus. The petitioners challenge the validity of state convictions for criminal contempt and the resulting sentences imposed for violation of restraining order entered on August 30, 1963, requiring petitioners to desist and refrain from unlawfully interfering with the business of the Jefferson Bank and Trust Company by physically obstructing entrance and exit of customers or by preventing patrons usual access to tellers' windows and other departments of the bank. Peaceful picketing was not proscribed.[1]

Petitioners' convictions all arose out of asserted willful violations of such order. Each of the three cases before us involves separate and distinct violations of the restraining order occurring on different dates. Separate hearings were had with respect to each demonstration. Case No. 18,032 arose out of a demonstration at the bank on August 30, 1963. Petitioners found guilty in this respect, together with the sentences imposed, are:

Name	City Jail	Fine
Robert B. Curtis	270 days	$1,000.00
William L. Clay	270 days	1,000.00
Rev. Charles Perkins	180 days	500.00
Lucien Richards	90 days	500.00
Norman Seay	90 days	500.00

Case No. 18,011 arose out of the October 4, 1963, demonstration. The petitioners found guilty, and the sentences imposed, are:

---

[1] The terms of the restraining order may be found in **Curtis v. Tozer**, 374 S. W. 2d 557, 563.

Name	City Jail	Fine
Louis Ford	One Year	$500.00
Taylor Jones	One Year	500.00
Benjamin Goins	180 days	500.00
Ian Grand	180 days	500.00
Mrs. Roberta Tournour	120 days	500.00
Kenneth Lee	60 days	500.00
Ronald Glenn	60 days	500.00

Case No. 18,033 arose out of the October 7, 1963, demonstration. The petitioners convicted, with the sentences imposed, are:

Name	City Jail	Fine
James Peake	One Year	$500.00
Micheala Grand	120 days	500.00
Danny Pollock	60 days	500.00

Petitioners in all of these cases filed petitions for writ of habeas corpus with the St. Louis Court of Appeals. They were given a full evidentiary hearing. Relief was denied all petitioners now before us.[2] The St. Louis Court of Appeals in a fifty-page opinion, **Curtis v. Tozer,** 374 S. W. 2d 557, fully and fairly sets out the facts, the issues raised and the basis of disposition of such issues.

Petitioners next applied to the Supreme Court of Missouri for habeas corpus relief. Said Court on January 31, 1964, in an unreported opinion, denied relief, stating:

> "Application for writ of habeas corpus denied because petition and exhibits filed, including transcript of evidence submitted by petitioners to this Court, fail to show a claim on which relief can be granted for the reasons stated in the opinion of the St. Louis Court of Appeals in the consolidated cases of: **In the**

[2] The St. Louis Court of Appeals discharged four petitioners not involved in these appeals upon the grounds of insufficiency of the evidence to establish their guilt.

Matter of Robert B. Curtis et al. v. Martin L. Tozer, Sheriff, et al., No. 31,777, **In the Matter of Louis Ford et al. v. Martin L. Tozer, Sheriff, et al.**, No. 31,778, and **In the Matter of Michela Grand et al. v. Martin L. Tozer, Sheriff**, No. 31,779 certified copy of which opinion this Court has procured on its own motion."

Petitioners next sought habeas corpus relief from the United States District Court. Such relief was first denied upon the ground that the petitioners had not exhausted their state remedies by reason of their failure to apply to the United States Supreme Court for certiorari. Upon appeal, we reversed and remanded. **Curtis v. Boeger**, 8 Cir., 331 F. 2d 675, stating:

> "[T]he court determines that appellants were not, as a prerequisite to a hearing upon the merits of their application, required to petition the Supreme Court of the United States for writ of certiorari and further determines that they have exhausted their state remedies within the teaching of **Fay v. Noia**, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837.
>
> "Accordingly, the orders appealed from should be and hereby are vacated and the causes are remanded to enable the District Court to consider the question on the basis of **Fay v. Noia**, supra, and to consider whether the issues sought to be raised are such as call for a hearing under **Townsend v. Sain**, supra." [372 U. S. 293.]

Upon remand, the District Court determined that the petitions presented only legal issues, that all fact issues had been fully tried and fairly determined by the state courts, and that no asserted federal constitutional rights of petitioners had been violated. The petitions were dismissed. **Ford v. Boeger**, 236 F. Supp. 831; **In Re Curtis' Petition**, 240 F. Supp. 475. These appeals are from such dismissals.

The legal issues presented by all petitioners are in substance the same. The errors relied upon as a basis for reversal may be summarized as follows:

I. Improper denial of an evidentiary hearing.

II. Lack of jurisdiction in the state court to issue the restraining order upon which the contempt convictions were based.

III. Procedures followed deprived plaintiffs of rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments.

IV. Conviction of contempt without benefit of jury trial constituted denial of due process.

V. The restraining order violates petitioners' right of free speech guaranteed by the First and Fourteenth Amendments.

VI. James Peake's punishment constituted cruel and inhuman punishment in violation of the Eighth Amendment.

VII. Other errors.

The facts bearing upon the issues before us are fully and fairly set out in the opinions of the St. Louis Court of Appeals and the District Court, heretofore cited. The demonstrations upon which the contempt convictions were based arose out of efforts of CORE to have the Jefferson Bank and Trust Company employ four negroes in clerical positions. The bank was advised that direct action would be taken against it if the requested positions were not made available. The bank replied it had no openings. The bank, acting upon information which it had obtained that CORE planned sit-ins, stand-ins and lie-ins at the bank on August 30, instituted an action in the state court for an injunction and restraining order. The order was served on most of the defendants before the August 30

demonstration and upon substantial evidence, the state court found that all participating petitioners had notice of the restraining order before the demonstration in which they participated. In the demonstrations, the petitioners blocked the entrance to the bank by standing in front of the entrance locking arms and blocked entrance to the tellers' windows by sitting and lying in front of such windows. While the demostrations were in progress, the restraining order was read by a bank official, the demonstrators were requested to leave and refused to do so.

We now proceed to the consideration of the errors raised.

I.

No error was committed in denying an evidentiary hearing. At a pretrial conference called to consider the necessity of an evidentiary hearing, petitioners limited their request to produce additional evidence to the following items: (1) The nature and extent of the alleged labor dispute between CORE and the bank. (2) Bias and prejudice on the part of special prosecutor Millsap. (3) Discriminatory hiring practices of the bank.

It appears that full opportunity was afforded in the state court to present evidence upon each of said points and no showing has been made that the proposed additional evidence would be material upon any controlling issue before us.

The trial court recognized that **Townsend v. Sain** requires an evidentiary hearing when material facts are in dispute. Judge Meredith, at p. 834 of 236 F. Supp., states that after reading petitioners' application and brief, it is his view that no facts are in dispute and that the dispute relates only to conclusions of law. We agree.

Even when facts are disputed, an evidentiary hearing is unnecessary where the state court after a full hearing

reliably found the relevant facts. **Townsend v. Sain,** 372 U. S. 293, 312-13. See **Case v. Nebraska,** 381 U. S. 336, 345, Justice Brennan concurring.

II.

Petitioners in support of their contention that the state court lacked jurisdiction to issue the restraining order urge that CORE is a labor organization and that the dispute between CORE and the bank is a labor dispute of a type with respect to which the federal government by means of the National Labor Relations Act, 29 U. S. C. A., § 151 et seq., has preempted the field. Inasmuch as we are of the view, as hereinafter set forth, that no preemption exists under the facts of this case, we shall in the interest of not unduly prolonging this opinion assume without so deciding that CORE is a labor organization and that the dispute is a labor dispute covered by the Act.

In **Weber v. Anheuser-Busch, Inc.,** 348 U. S. 468, 480-81, the Court states:

> "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in **Garner v. Teamsters Union,** *supra.* But as the opinion in that case recalled, the Labor Management Relations Act 'leaves much to the states, though Congress has refrained from telling us how much.' 346 U. S., at 488. The penumbral area can

be rendered progressively clear only by the course of litigation. . . ."

To like effect, see **San Diego Unions v. Garmon,** 359 U. S. 236, 240-241; **International Association of Machinists v. Gonzales,** 356 U. S. 617, 619; **Garner v. Teamsters Union,** 346 U. S. 485, 488.

In **Allen-Bradley Local v. Wisconsin Employment Relations Board,** 315 U. S. 740, the Court held that the National Labor Relations Act did not preclude state action restraining mass picketing, obstructing entrance and egress from the employer's factory and obstructing public roads and threatening injury to employees desiring to work. The Court states:

> "We agree with the statement of the United States as *amicus curiae* that the federal Act was not designed to preclude a State from enacting legislation limited to the prohibition or regulation of this type of employee or union activity. The Committee Reports on the federal Act plainly indicate that it is not 'a mere police court measure' and that authority of the several States may be exerted to control such conduct. Furthermore, this Court has long insisted that an 'intention of Congress to exclude States from exerting their police power must be clearly manifested.' . . ." 315 U. S. 740, 748-49.

In **Auto Workers v. Wisconsin Board,** 351 U. S. 266, the Court holds that subsequent amendments to the National Labor Relations Act have not impaired **Allen-Bradley** holdings. The general rule that state courts may not enjoin conduct which has been made an unfair labor practice is recognized. The Court goes on to say:

> "But our post-Taft-Hartley opinions have made it clear that this general rule does not take from the States power to prevent mass picketing violence, and

overt threats of violence. The dominant interest of the State in preventing violence and property damage cannot be questioned. It is a matter of genuine local concern. Nor should the fact that a union commits a federal unfair labor practice while engaging in violent conduct prevent States from taking steps to stop the violence. This conclusion has been explicit in the opinions cited in note 12.

"The States are the natural guardians of the public against violence. It is the local communities that suffer most from the fear and loss occasioned by coercion and destruction. We would not interpret an act of Congress to leave them powerless to avert such emergencies without compelling direction to that effect.

"We hold that Wisconsin may enjoin the violent union conduct here involved. . . ." 351 U. S. 266, 274-75.

Additional recognition of the right of a state to afford protection against union violence is found in **Teamsters Union v. Morton**, 377 U. S. 252, 257; **San Diego Unions v. Garmon**, 359 U. S. 236, 247; **Youngdahl v. Rainfair, Inc.**, 355 U. S. 131, 138-39; **Garner v. Teamsters Union**, 346 U. S. 485, 488.

Examination of the record before us shows that only violent conduct within the scope of matters left to state jurisdiction is here enjoined. Peaceful picketing is not proscribed. We agree with the conclusion of the St. Louis Court of Appeals upon this issue, thus stated: "As already indicated, violence, intimidation and similar acts may be restrained and enjoined even though they are threatened or committed in connection with a labor dispute." 374 S. W. 2d 557, 595.

Petitioners' reliance upon the Norris-LaGuardia anti-injunction Act, 29 U. S. C. A., § 101 et seq., is misplaced,

The Norris-LaGuardia injunction limitations are imposed only upon courts of the United States. The Court of Appeals for the Third Circuit in **American Dredging Co. v. Local 25**, 3 Cir., 338 F. 2d 837, 850-56, clearly and convincingly demonstrates why the prohibition applies only to federal courts—not to state courts.

An additional separate and independent basis exists for upholding the criminal contempt convictions. **United States v. United Mine Workers**, 330 U. S. 258, and cases cited therein, clearly hold that where a bona fide doubtful question of jurisdiction is presented, the trial court has a right to issue a restraining order to maintain the status quo while it is determining its own authority to grant injunctive relief. As a necessary consequence, the court has the power to punish the violation of a restraining order so made by contempt proceedings. The Court states:

> "Proceeding further, we find impressive authority for the proposition that an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. This is true without regard even for the constitutionality of the Act under which the order is issued. In **Howat v. Kansas**, 258 U. S. 181, 189-90 (1922), this Court said:
>
> > 'An injunction duly issuing out of a court of general jurisdiction with equity powers upon pleadings properly invoking its action, and served upon persons made parties therein and within the jurisdiction, must be obeyed by them however erroneous the action of the court may be, even if the error be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for

> error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.'
>
> Violations of an order are punishable as criminal contempt even though the order is set aside on appeal, **Worden v. Searls**, 121 U. S. 14 (1887), or though the basic action has become moot, **Gompers v. Bucks Stove & Range Co.**, 221 U. S. 418 (1911)." 330 U. S. 258, 293-94.

See **United States v. Shipp**, 203 U. S. 563; **Carter v. United States**, 5 Cir., 135 F. 2d 858.

Similarly, in our present case the court issuing the restraining order had jurisdiction and at least a bona fide question exists on the court's right to issue the injunction sought. The court has power to preserve existing conditions while it is determining its own authority to grant injunctive relief.

In our present case, the record before us shows that the Circuit Court of St. Louis, after due notice to all parties and full hearing, granted a permanent injunction on December 6, 1963, enjoining substantially the same conduct prescribed by the restraining order. So far as we can ascertain, no appeal was taken from such order. The district court in the present case in its opinion correctly held, "The Court had jurisdiction over the subject matter and the parties and until reversal by orderly and proper proceedings, disobedience to the restraining order was subject to punishment for contempt." 240 F. Supp. 475, 482-83.

III.

Petitioners next urge that the proceedings followed in the state court deprived them of rights guaranteed by the Fifth, Sixth and Fourteenth Amendments. Under

this heading, they urge that they were deprived of a fair trial by reason of the following: (1) Petitioners in **Ford**, No. 18,011, were not allowed a reasonable time to prepare for trial. (2) Appointment of attroney Millsap as special prosecutor, and the prejudicial manner in which he conducted the proceedings. (3) Insufficient notice of nature of charges made. (4) Extensive adverse newspaper and radio publicity.

All of such contentions were fully heard and fairly considered by the St. Louis Court of Appeals as reflected by its opinion. Upon the basis of the record, such court was justified in determining that petitioners' constitutional rights were not violated in the respects claimed. The United States District Court hearing these cases was warranted in determining as it did that the petitioners had a fair trial and that their constitutional rights were not violated in the respects claimed.

The prejudicial publicity issue was not fairly raised either in the state court or in the federal district court. The contempt proceedings were tried to Judge Scott without a jury. It is not likely that an experienced judge will be influenced in his decisions by such publicity. The conclusions reached by the state trial court were supported by substantial evidence and it is difficult to see how the court could have fairly arrived at any other conclusions with respect to the guilt of contempt.

IV.

Petitioners urge that the substantial sentences imposed without benefit of a jury trial constitute a denial of due process under the Sixth, Eighth and Fourteenth Amendments. This contention was never raised in the state courts. 28 U. S. C. A., § 2254 specifically requires a state prisoner to exhaust all available state remedies before he can resort to federal habeas corpus relief. The Su-

preme Court in **Case v. Nebraska,** 381 U. S. 336, particularly in the concurring opinions, points out the desirability of minimizing the necessity for state prisoners to resort to federal habeas corpus and urges the prior utilization of available state procedure for testing claims of violation of federal constitutional rights.

In instances where adequate state procedures are available, this court has repeatedly held that the exhaustion of such state remedies is required before federal habeas corpus may be entertained. **Ellenson v. Fugate,** 8 Cir., 346 F. 2d 151; **Dabney v. Sigler,** 8 Cir., 345 F. 2d 710; **Witt v. Nash,** 8 Cir., 342 F. 2d 791; **Cyronne-DeVirgin v. State of Missouri,** 8 Cir., 341 F. 2d 568.

The **Witt** case, supra, arose out of a Missouri conviction. We there re-expressed our view that the Missouri Supreme Court Rule 27.26 is the substantial equivalent of 28 U. S. C. A., § 2255 and that it provides for a fair post-conviction review of federal constitutional violations charged in state trials resulting in conviction. We remanded with direction to the district court to dismiss the proceeding without prejudice to appellant's right to seek relief in the state court.

It is also a well-established principle of appellate review that generally issues not fairly raised in the trial court cannot be considered upon appeal. **Vincent v. United States,** 8 Cir., ... F. 2d ... (June 7, 1966); **Masters v. Eide,** 8 Cir., 353 F. 2d 517, 518; **Haynes v. Harris,** 8 Cir., 344 F. 2d 463, 466; **Sutton v. Settle,** 8 Cir., 302 F. 2d 286, 288; see **Yakus v. United States,** 321 U. S. 414, 444; **Whitney v. California,** 274 U. S. 357, 362-63; **Page v. United States,** 8 Cir., 282 F. 2d 807, 810.

Petitioners at the state court trial were represented by numerous competent counsel. At the time of the trial in 1963, no right to a jury trial in criminal contempt cases had been established. See **Green v. United States,**

356 U. S. 165, 186-87. Doubtless because of this state of the law, no jury trial was demanded.

United States v. Barnett, 376 U. S. 681, decided after denial of habeas corpus by the St. Louis Court of Appeals, and **Cheff v. Schnackenberg**, ... U. S. ..., decided June 6, 1966, indicate that a view has developed in the Supreme Court to the effect that a jury trial should be granted in criminal contempt cases in instances where substantial penalties are imposed. Contempt convictions were affirmed in each of these cases. Each case arose out of a federal contempt conviction. In **Cheff**, the Court after deciding the case before it goes on to say:

> "Therefore, in the exercise of the Court's supervisory power and under the peculiar power of the federal courts to revise sentences in contempt cases, we rule further that sentences exceeding six months for criminal contempt may not be imposed by federal courts unless a jury trial has been received or waived. Nothing we have said, however, restricts the power of a reviewing court, in appropriate circumstances, to revise sentences in contempt cases tried with or without juries." ... U. S. ..., ...

Since the Court states the foregoing position is taken on the basis of its supervisory power over federal courts, not on the basis of violation of a constitutional right to a jury trial, it would appear that the pronouncement does not apply directly to state criminal contempt convictions. The last sentence of the pronouncement may indicate that a federal conviction without a jury can be validated by reduction of the sentence to six months or less. We find nothing in the cases just discussed which indicates the new policy is to be retroactively applied. Here the state convictions became final at least in 1964.

Inasmuch as the jury issue was not fairly presented either to the state court or the federal district court, no error was committed in not deciding such issue.

V.

Petitioners on brief here urge that the restraining order issued and the contempt convictions based thereon violate petitioners' right of free speech and assembly guaranteed under the First and Fourteenth Amendments. Defendant asserts that the issue of free speech and assembly was not raised in the state court or in the United States District Court. Petitioners have not answered this contention. Petitioners in the United States District Court did in very general and broad language assert violation of the First Amendment but the issue was not pressed in the district court nor was it passed upon. In our view, the issue was not fairly or adequately raised. Upon the basis of the authorities cited in the previous division, issues not raised in the state court cannot be pursued by a state prisoner in federal habeas corpus. In any event, we are satisfied for reasons hereinabove discussed, that petitioners conduct goes well beyond protected free speech. See **Pritchard v. Downie**, 8 Cir., 326 F. 2d 323.

VI.

In the cases before us for review, petitioners raise the issue that sentences imposed upon them were excessive and constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The sentences imposed were within the limits provided by the applicable Missouri statute, V. A. M. S., § 476.120. As properly pointed out in the trial court's opinion, p. 485 of 240 F. Supp., p. 834 of 236 F. Supp., state sentences authorized by statute are not subject to attack by federal habeas corpus.[3]

[3] At the time the sentences were imposed, the repetitive violent demonstrations created a situation which required effective state action to re-establish law and order. Looking at the situation in retrospect after a considerable lapse of time, some of the penalties may seem rather severe. Defendants, after serving

On this appeal, the only sentence attacked on the cruel and unusual punishment grounds is that of James Peake. Peake was sentenced to one year's imprisonment of which he has served some fifty-five days. It is undisputed that Peake is a paraplegic and that he cannot move without the aid of a wheel chair. Such physical condition is a factor which is entitled to consideration by the sentencing court and by prison officials. There is no record before us with respect to any undue hardship suffered by Peake in serving his sentence. Statements in brief without record support cannot be considered.

Should Peake be required to serve the balance of his sentence, we cannot assume that the Missouri courts and prison officials will not give proper consideration to his physical handicaps. In any event, we are of the view that Peake should exhaust state remedies available before seeking federal habeas corpus relief.

VII.

Other issues urged do not rise to the stature of federal constitutional rights. The issue of the validity of the bond filed presents only a question of contract interpretation and state law. The issue of whether some of the defendants were within the class of those restrained or whether they were guilty by reason of wrongfully and knowingly acting in collusion with those restrained was fairly tried and determined. The exhaustive opinion of the St. Louis Court of Appeals clearly reflects that full and fair consideration was given to all of petitioners' complaints and that no fundamental federally guaranteed constitutional rights were denied petitioners.

---

part of their sentences, have been released upon bail. We have determined that the sentences were constitutionally imposed and valid. We have no clemency powers. The power to reduce or suspend the sentences imposed lies with the appropriate Missouri courts and officials.

Petitioners have failed to establish that the United States District Court committed any error in denying their petitions for federal habeas corpus relief.

The judgments dismissing the petitions for writs of habeas corpus are affirmed.

A true copy.

Attest:
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B.

United States Court of Appeals
For the Eighth Circuit.

September Term, 1965.

No. 18011

Louis Ford, et al., Appellants,
vs.
William Boeger, Warden, St. Louis City Jail.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 18032

Robert B. Curtis, et al., Appellants,
vs.
William Boeger, Warden, St. Louis City Jail.

Appeal from the United States District Court for the Eastern District of Missouri.

No. 18033

Michela Grand, et al., Appellants,
vs.
William Boeger, Warden, St. Louis City Jail.

Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellants for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

August 16, 1966

Order entered at direction.

Robert C. Tucker,
Clerk, U. S. Court of Appeals, 8th Circuit.

APPENDIX C.

Notice Read to Petitioners.

You are hereby charged with wilfull disobedience on October 7, 1963 of said Restraining Order lawfully issued in one or more of the following particulars and with full knowledge and notice of said Restraining Order:

"(1) Physically hindering and preventing customers of plaintiff and other members of the public from entering and leaving plaintiff's place of business by locking arms in front of entrances.

"(2) By entering said banking premises and sitting in, lying in, standing in, milling about and singing and chanting therein and thereby interfering with the proper and normal conduct of plaintiff's banking business.

"(3) Standing and loitering in front of tellers' windows so as to prevent customers of plaintiff's bank from utilizing the facilities for the conduct of their proper and normal business with the plaintiff.

"(4) Harrassing plaintiff and hindering and interfering with the proper and normal conduct of plaintiff's business by entering said bank for the purpose of making change which purpose was solely to harrass plaintiff and interfere with the normal conduct of its business.

"(5) Harrassing plaintiff and hindering and interfering with the proper and normal conduct of plaintiff's business by entering said bank for the purpose of becoming customers of the bank which purpose was solely to harrass plaintiff and interfere with the normal conduct of its business.

"(6) Refusing to leave plaintiff's banking premises after having been requested to do so and by so refusing, to harrass plaintiff and interfere with the normal conduct of plaintiff's business.

"The foregoing charges and specifications constitute offenses against the Majesty of the Law and the dignity and authority of this Court and are punishable as for criminal contempt.

"You are hereby ordered to show cause at ten o'clock A. M., on Monday, October 10, 1963, why you should not be punished for criminal contempt."

APPENDIX D.

In the Supreme Court of Missouri,
In Banc.

January 31, 1964.

In the Matter of: Robert B. Curtis, William L. Clay, Lucien Richards, Rev. Charles Perkins, and Norman Seay,

Petitioners,

v.

Martin L. Tozer, Sheriff of the City of St. Louis, and William Boeger, Warden of the Municipal Jail, City of St. Louis,

Respondents.

No. 50,596.

Application for writ of habeas corpus denied because petition and exhibits filed, including transcript of evidence submitted by petitioners to this Court, fail to show a claim on which relief can be granted for the reasons stated in the opinion of the St. Louis Court of Appeals in the consolidated cases of: In the Matter of Robert B. Curtis et al. v. Martin L. Tozer, Sheriff, et al., No. 31,777, In the Matter of Louis Ford et al. v. Martin L. Tozer, Sheriff, et al., No. 31,778, and In the Matter of Michela Grand et al. v. Martin L. Tozer, Sheriff, No. 31,779 certified copy of which opinion this Court has procured on its own motion.

Day-to-Day

.....

JAN 14 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 871.

MICHELA GRAND, DANIEL POLLOCK, JAMES PEAKE, JR.,
Petitioners,

vs.

WILLIAM BOEGER, Warden, St. Louis City Jail,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

RESPONDENT'S BRIEF IN OPPOSITION.

STATEMENT OF THE CASE.

Respondent feels it necessary to state additional facts, since the facts as stated by Petitioners are incomplete.

The convictions of petitioners grew out of activities occurring on October 7, 1963. On that day, prior to the entry into the bank of these petitioners, picketing had been conducted outside the bank (T. G. 59, 67, 190). At least one of the individuals named as a defendant in the in-

junction suit (Reverend Charles Perkins) participated in the picketing (T. G. 60). This was shown by photographic exhibits (T. G. 162). Photographic evidence also showed that prior to the acts of petitioners for which they were convicted, placards and signs identifying the picketers as being members of CORE were carried about outside the bank (T. G. 163). Another of the individuals named as defendant (Lucien Richards) walked in the picket line outside the bank (T. G. 190). Further, Richards was observed giving money to two girls, and was heard instructing the girls to open accounts at the bank, prior to the acts committed by petitioners (T. G. 272-273).

During the picketing, and prior to the entry into the bank by any of the petitioners, a statement was read over a loud-speaker calling attention to the restraining order, among other things (T. G. 283). Loud speakers carried the statement inside and outside the bank (T. G. 277). The reading of the statement began at 4:30 P. M. and ended about 5:00 P. M., and it was read approximately six times (T. G. 303).

Photostatic copies of the restraining order were posted about the bank; in particular copies were posted at both entrances to the bank (T. G. 54).

The first of these petitioners to enter the bank was Daniel Pollack. He entered the bank at approximately 4:45 P. M. (T. G. 176). He went to teller's window 10, and stood in front of that window (T. G. 177). He was then told by a police officer that he could not block the window, but "he just stood there" (T. G. 177-178). While he was standing there, a deputy sheriff handed him a copy of the restraining order (T. G. 262). Thereupon, Pollack sat on the floor of the bank, with a copy of the restraining order in his hand, until the police carried him out of the bank (T. G. 179). He sat on the floor for three to five minutes (T. G. 179).

Petitioner Grand entered the bank through the front door and went to window 10 (T. G. 333). She was asked if she was a customer of the bank, but she made no reply (T. G. 333). She was asked to leave the bank, but again made no reply (T. G. 334). While she was standing at that window, a deputy sheriff handed her a copy of the restraining order (T. G. 261). She then sat on the floor and remained there until the police carried her out (T. G. 181).

Petitioner Peake was in a wheelchair being pushed by one Jim Lang (T. G. 250). He entered the bank twice (T. G. 308). On the second entry, he was wheeled through the north door and brought to a position in the main lobby of the bank (T. G. 308). He was then engaged in conversation by a police officer, the bank president and by another bank officer (T. G. 309). Previously, outside the bank, he stated to a reporter that he would disobey the law, "if it will further the Negroes rights" (T. G. 185). He told a bank officer that he was a demonstrator, and he stated that he had no business in the bank (T. G. 309). He was then handed a copy of the restraining order (T. G. 237, 309), as was Jim Lang (T. G. 250). After receiving the copy of the order, he was asked to leave by Police Major Eitzman (T. G. 29), by the president of the bank (T. G. 79), and by another bank officer (T. G. 309). He remained in the same position until taken from the bank by police officers (T. G. 29).

QUESTION PRESENTED.

Certiorari should be denied petitioners on their claim that they were denied fundamental federally guaranteed Constitutional rights when they were convicted of criminal contempt for violating a restraining order to which they were not parties although having knowledge of the issuance of and having been served with a copy of said restraining order.

POINTS AND AUTHORITIES.

Certiorari should be denied petitioners on their claim that they were denied fundamental federally guaranteed Constitutional rights when they were convicted of criminal contempt for violating a restraining order to which they were not parties although having knowledge of the issuance of and having been served with a copy of said restraining order.

Yakus v. U. S. (1943), 321 U. S. 414;
Whitney v. California (1926), 274 U. S. 357;
In re Coggshall (1903), 100 Mo. App. 585, 75 S. W. 183;
Ex parte Dillon (1936, Mo. App.), 96 S. W. 2d 1095;
Engel Sheet Metal Equipment v. Shewman (1957, Mo. App.), 307 S. W. 2d 694, l. c. 696;
Ex parte Lennon (1891), 166 U. S. 548;
Chisolm v. Caines (1903, C. C. 4th), 121 F. 397, l. c. 401.

Miscellaneous.

17 Corpus Juris Secundum 92, Contempt, Sec. 33.

ARGUMENT.

The contention of Petitioners that they were not bound by temporary restraining order because they were not parties, privies or members of a class was never presented to the District Court for review.

Appropriate to consideration of this claim is the pronouncements of this Court in **Page v. United States,** 282 F. 2d 807 (1960). There it was said, to wit:

> . . . It has always been the rule that, in order to prevent a miscarriage of justice, a federal appellate court, in the exercise of a sound discretion, may notice plain and vital errors occurring during the trial of a criminal case, although not preserved for review by objection or exception. **Wilborg v. United States,** 163 U. S. 632, 658, 16 S. Ct. 1127, 1197, 41 L. Ed. 289; **Crawford v. United States,** 212 U. S. 183, 194, 29 S. Ct. 260, 53 L. Ed. 465; **Whitney v. People of State of California,** 274 U. S. 357, 380, 47 S. Ct. 641, 71 L. Ed. 1095; **Ayers v. United States,** 8 Cir., 58 F. 2d 607, 608-609. But the power of a reviewing court to consider a question first presented on appeal is an exception to the rule that such a court will not consider errors not objected to at the trial. **Lamento v. United States,** 8 Cir., 4 F. 2d 901, 904. A trial judge ordinarily should not be held to have erred in not deciding correctly a question that he was never asked to decide.

Moreover, a review of the documents addressed to relief by way of habeas corpus in the St. Louis Court of Appeals and the Supreme Court of Missouri will also prove that such present claim of error was never asserted prior (R. St. Louis Court of Appeals—Applications for Writ of Habeas Corpus, Case Nos. 31,777-31,779; Supreme Court

of Missouri, Applications for Writ of Habeas Corpus, Case Nos. 50,596-50,598). Under such a condition of the Record, Respondent suggests that the language of the Supreme Court of the United States addressed to this point in **Whitney v. California** (1926), 274 U. S. 357, 47 S. Ct. 641, 71 L. Ed. 1095, is applicable, to wit:

> It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court.

In Page v. United States, supra, this Court recognized the still binding force of the Whitney rule (immediately foregoing) in relying upon **Yakus v. United States** (1943), 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834. This Court pointed out the following teaching from Yakus (U. S. 444-445), to-wit:

> No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. **O'Neil v. State of Vermont,** 144 U. S. 323, 331, 12 S. Ct. 693, 696, 36 L. Ed. 450; **Barbour v. State of Georgia,** 249 U. S. 454, 460, 39 S. Ct. 316, 317, 63 L. Ed. 704; **Whitney v. People of State of California,** 274 U. S. 357, 360, 362, 380, 47 S. Ct. 641, 642, 643, 650, 71 L. Ed. 1095. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in a case in which it was properly taken. **Seaboard Air Line Ry. Co. v. Watson,** 287 U. S. 86, 53 S. Ct. 32, 77 L. Ed. 180. While this Court in its discretion sometimes departs from this

rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see **Brandeis, J.** concurring in **Whitney v. People of State of California**, supra, 274 U. S. at page 380, 47 S. Ct. at page 650, 71 L. Ed. 1095, and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare **Woolsey v. Best**, 299 U. S. 1, 57 S. Ct. 2, 81 L. Ed. 3, with **Ex parte Siebold**, 100 U. S. 371, 25 L. Ed. 717.

Upon the basis of the above authorities this court ought not to entertain the claim of a denial of fundamental Federally guaranteed constitutional rights when raised for the first time in the United States Court of Appeals for the Eighth Circuit.

With regard to Petitioners' assertion that they are not, "parties, privies or members of [the] class," Respondent urges that this contention is erroneous. It is apparent that the assertion is premised upon Petitioners' too-limited comprehension of the inclusion of the plaintiff's petition and the Circuit Court's temporary restraining order. This appears throughout the argument and is patently demonstrated by the assertion (Petitioners' Brief, p. 11) that:

> "Petitioners in this case were not parties to the injunction nor members of CORE and therefore were not bound by the injunction issued in **Jefferson Bank and Trust Company v. Curtis et al.**"

Implicit in this fallacious limitation of the restrained class is the belief that the Petitioners must satisfy organic formal membership requirements of the Committee of Racial Equality to be the object of the suit or the order of the court. This overlooks the realities of the petition and the decisional law applicable. The class included within the petition is all or any persons or person fairly represented by the individually identified defendants. Who these in-

individuals legally represent is to be gathered from the recitals of the petition. There they are identified by reference to their common plan and design to act in concert to carry out the threats to enforce the stated demand. This class, from the nature of the situation, was not limited in either numbers (i. e., persons) or time.

The Petitioners' participation in the common plan and design, by their commission of the prohibited acts, after notice of the restraining order, was sufficient under Missouri law to render them amenable to punishment for criminal contempt. Illustrative of this is **In re Coggshall** (1903), 100 Mo. App. 585, 75 S. W. 183. There the court sustained a criminal contempt conviction for violation of a restraining order and held that it was unnecessary that the contemnor be a "named party" to the bill. Similarly, a like rule was applied in **Ex parte Dillon** (1936), 96 S. W. 2d 1095. There it was said, to wit:

> . . . [2, 3] The contention of petitioners that the injunction of the court was not valid against them and that they were not liable to the penalties of contempt for the violation thereof for the reason that they were not parties to the suit in which the order of injunction was made and were never served with any legal process so as to give the court or the judge thereof jurisdiction over them in said matter cannot avail them, as the rule in this state is that one is amenable to an injunction although not a party to the suit in which it was issued and although not actually served with process therein, if it be made to appear that such one had notice of such injunction and thereafter violated the same. **In re Coggshall,** 100 Mo. App. 585, 75 S. W. 183. . . .

In **Engel Sheet Metal Equipment v. Shewman** (1957, Mo. App.), 307 S. W. 2d 694, l. c. 696, the rule was reaffirmed in the following language, to wit:

> . . . Consequently, one who, with notice, participates in acts in violation of an injunction is guilty of contempt and the fact that he was not a party to the action, or actually served with a copy of the injunction, will not relieve him. **Middleton v. Tozer**, Mo. App., 259 S. W. 2d 80. . . .

It is apparent that the Federal courts follow the same rule. **Chisolm v. Caines** (1903, C. C. 4th), 121 F. 397, l. c. 401, makes a clear exposition of the responsibility of even strangers to the parties, who have actual notice of a court's order. (See also: **Ex parte Lennon** (1891), 166 U. S. 548, 17 S. Ct. 658, 41 L. ed. 1110.) Of interest also is the encyclopedic law restatement found at **17 Corpus Juris Secundum 92** (Contempt, Sec. 33), to wit:

> . . . Strangers who have knowledge or notice of an order, such as a restraining order, and who are the servants or agents of the person or class of persons against whom it is directed, or who act in collusion or in combination with such person or class of persons, are punishable in contempt for the violation of the order. . . .

Here, the Petitioners, with full and complete knowledge of the Court's order and the reasons and purposes thereof, acted in wilful and deliberate violation of the order. Further, their acts were the result of the execution of a common plan and design and community of interest to accomplish a common end by specific means in concert, association, combination and collusion with other members of the class to which they belonged.

CONCLUSION.

Petitioners fail to present any reasons why this Court should grant a review on writ of certiorari. They fail to state any important question of federal law which has not been but which should be decided by this Court. They

fail to cite any departure from accepted judicial standards by a lower court which calls for the exercise of this Court's power. They fail to show that the State Courts decided any federal question in a way so as to conflict with any decision of this Court. They fail to show any federal court decision in this case which is in conflict with any decision of this Court. They fail to show that the Court of Appeals' decision in any way conflicts with the decisions of any other Court of Appeals.

Petitioners failed to raise or fairly present the issues they now urge as the basis for seeking this Court's review.

Petitioners' convictions for criminal contempt by the State Court were based on state law. The procedures followed in obtaining these convictions complied in every respect with proper constitutional safeguards. There exists no grounds for the granting of a writ of certiorari and hence Petitioners' request should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 870.

ROBERT B. CURTIS, WILLIAM L. CLAY, REV. CHARLES PERKINS, LUCIEN RICHARDS, NORMAN SEAY,
Petitioners,

vs.

WILLIAM BOEGER, Warden, St. Louis City Jail,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

PETITIONERS' REPLY TO RESPONDENT'S STATEMENT OF THE CASE.

Petitioners have found it necessary herein to correct certain factual errors and misstatements of law found in Respondent's Brief in Opposition.

1. On page 2 of his brief, respondent states, "Petitioner Curtis, as president of CORE, announced that the direct action might consist of a sit-in, a stand-in, or a walk-in at the bank so as to interfere with the business of the bank." This statement is not supported by a transcript

page number and is totally false. Furthermore it would be hard to verify the statement since no information is given as to whom the announcement was made or how.

2. On page 3, respondent states, "After hearing Mr. Oldham's explanation, the members of CORE at this meeting held on the evening of August 29, 1963, voted to blockade the bank (Tr. 1159)." The page reference is made to the portion of the transcript containing Mr. Millsap's reading into the record of selected parts of Herman Thompson's deposition as an admission against interest. However, direct evidence at the trial subject to cross-examination indicated that CORE voted to picket the bank and by a separate motion by a count of 18 to 13 voted that individuals could risk arrest by standing at the front door of the bank. The word blockade was not used (Tr. C. 743).

3. On page 5, respondent states, "Petitioners Curtis then called for a show of hands of all persons who were willing to violate the restraining order not withstanding the possibility of punishment." There is no transcript citation for this statement but three witnesses, called by Mr. Millsap, testified that Carl Farris asked for a show of hands (Tr. C. 1497-9, 850, 858, 1428, 1447).

4. On page 5, respondent states, "All persons present raised their hands except attorney Raymond Howard who had advised against violating the restraining order (Tr. 1067)." This statement fails to mention that two witnesses, one a deputy city marshal, stated that none of the petitioners raised his hand (Tr. C. 1428, 1447, 1499). It also fails to mention that, the witness, Denny Walsh, is a reporter for the **St. Louis Globe Democrat**; that during the job campaign at the bank the **Globe** printed numerous smear articles attacking CORE and petitioners; that Denny Walsh, under his own biline, wrote an article in the **Globe** entitled, "Pro-Communist Heavily Infiltrate CORE Leadership" suggesting that several members of the

CORE Advisory Committee including: Rev. Fred Shuttlesworth, Roger N. Baldwin, Rev. Allen Knight Chalmers, Rev. Martin Luther King, A. Phillip Randolph, A. J. Muste and Earl B. Dickerson, are Communists (St. Louis Globe Democrat, December 27, 1963 first installment of a ten part series attacking CORE).

5. On page 5, respondent states, "When the meeting dispersed following the vote, **demonstrators** went immediately to the doors of the bank and stood in front of the doors, linked arms, blocked egress and ingress of customers and employees of the bank, and sat in front of the doors of the bank with locked arms (Tr. 1070). At 5:25 or 5:30 o'clock P. M., the **demonstrators** entered the bank. They milled around inside the bank (Tr. 45). They congregated in front of the teller's cages. They sang loudly and clapped hands in unison. They sat down and laid down on the floor of the bank. They refused to leave the bank." (Emphasis supplied.) While the foregoing statement is not incorrect, the effect is to mislead the reader. By following immediately after a statement about certain individuals the Respondent has failed to make it clear that none of the **petitioners** were among the **demonstrators** or **pickets** who interfered with business at the bank. Furthermore, respondent fails to point out that the overwhelming weight of testimony pointed to the conclusion that at least some of the petitioners encouraged compliance with the court order (Tr. C. Feely: 778, 798, 756, 773; Ford: 855, 856, 859, 875; Kimbrough: 1493; Daly: 1013-14, 1019; Howard: 1421, 1427, 1428; Jones: 1486; Scott: 478).

6. Similarly on page 6, respondent misleads the reader by stating, "At approximately 5:50 o'clock P. M. petitioner Curtis entered the bank and announced, 'We will stay here until six o'clock and then we will go to the Wheatly Y. W. C. A.' (Tr. 52)." The above statement ignores the fact that almost all witnesses, testified that Curtis entered the bank at about three minutes to six to

ask the pickets to "leave" at 6:00—not "stay" until 6:00 (Tr. C. 122, 124, 134, 305, 763, 530, 871, 990, 695). Furthermore, the statement of witness Howard who explained that he, Curtis and Oldham got together at 5:50 to devise a plan to get the pickets out of the bank and decided to use "closing time" as a reason for asking pickets to leave (Tr. C. 1431-33).

7. In spite of the respondent's factual errors of commission or omission, it is important to note that no reference is made to any act of **violence** on the part of any of the petitioners, pickets or CORE members. Or that they threatened, cursed, or intimidated anyone. It is also important to note that no reference has been made to testimony indicating that any of petitioners directed or encouraged anyone to violate the injunction.

ARGUMENT.

I.

Petitioners' Reply to Point One of Respondent's Brief in Opposition.

Respondent's brief contains the following statement on page 11, "The evidence shows petitioners actually voted to defy the restraining order with full knowledge of the possible consequences" (Tr. 1067).

Respondent's support for this statement was the testimony of **Globe-Democrat** reporter Denny Walsh, referred to in the Statement of the Case, ante. Witnesses Howard and Kimbrough stated that none of the petitioners voted to defy the injunction (Tr. C. 1428, 1447, 1499).

But suppose it is true that petitioners did in fact vote to defy the injunction? Is this the only wrongful act that petitioners are accused of committing? And if not what are the additional wrongful acts committed by petitioners and how did these acts or words cause violation of the injunction? Instead of a cause and effect analysis respondent simply states on page 11, "It (the injunction) contains no free speech limitations. The Court of Appeals properly held that petitioners' **conduct** was well beyond protected free speech. Ford v. Boeger, supra, 1007." What conduct? What **specific** acts were petitioners found by the U. S. Court of Appeals to have committed and how many of the pickets reacted to their influence and in what manner? It is clear that respondent and the courts below have failed to make any analysis of petitioners' speech and conduct that satisfies the First Amendment. **Wood v. Georgia**, 370 U. S. 375.

II.

Petitioners' Reply to Point Two of Respondent's Brief in Opposition.

1. Respondent's brief on page 12 asserts that the Court below properly declined to decide whether or not CORE is a "labor organization" or was involved in a "labor dispute" within the meaning of the Act. However, in **New Negro Alliance v. Sanitary Grocery Co.**, 303 U. S. 552, this Court stated at page 561:[1]

> "**The Act does not concern itself with the background or the motives of the dispute.** The desire for fair and equitable conditions of employment on the part of persons of any race, color or persuasion and the removal of discrimination against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association. Race discrimination by an employer may reasonably be deemed more unfair and less excusable than discrimination against workers on the ground of union affiliation. There is no justification in the apparent purpose or the express terms of the act for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon differences of race or color." (Emphasis supplied.)

The respondent fails to state how it is possible to decide this point of federal preemption without deciding the basic controlling issues: i. e., the nature of the dispute and whether or not the matter is arguably within the primary jurisdiction of the NLRB.

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[1] See also **NLRB v. Tanner Motor Livery, Ltd.**, 349 F. 2d 1, 3-4.

2. Respondent next asserts that petitioners made an unlawful demand on Jefferson Bank and therefore the federal law does not apply, citing **Adams Dairy, Inc. v. Burke**, 293 S. W. 2d 281, cert. den. 352 U. S. 969, as authority. The **Adams Dairy** case does not apply to the case at bar for several reasons: (1) In **Adams Dairy** the Missouri Supreme Court reversed and remanded a judgment of the lower court which refused to issue the injunction requested. This Court might have denied certiorari because the state court judgment was not a final one. (2) The **Adams Dairy** case was decided several years before **Local No. 438 Construction v. Curry**, 371 U. S. 542, in which this Court stated for the first time that state court injunctions need not be final before the Supreme Court will assert jurisdiction in labor cases. (3) The **Adams Dairy** case is outdated even by Missouri standards since that court stated in **United Brick and Tile Division v. Wilkinson**, 325 S. W. 2d 50 at page 55:

> "So far, except for restraint of violence, the federal decisions have failed to clear this penumbral area in which state injunction power is said to exist. In case after case, approval of state court authority to restrain has been refused.
>
> "In our particular case it should be noted the parties stipulated that the company and its business meets the jurisdictional standard of the National Labor Relations Board. If this be true, then it seems the company should consider seeking relief directly from the Board."

It should be noted that **Adams Dairy** is a pre-**Garmon** case and **Wilkinson** is not.

3. It stands to reason that if state courts are allowed to determine for themselves what is and what is not a labor dispute, state courts could preempt the jurisdiction of the NLRB and assert jurisdiction simply by denying the existence of a labor dispute. This Court has taken the

position that all activities, **San Diego v. Garmon**, 359 U. S. 236, disputes, **Liner v. Jafco**, 375 U. S. 301, and organizations, **Marine Engineers Beneficial Ass'n v. Interlake**, 370 U. S. 173, that are "arguably" subject to the Act must be referred in the first instance to the NLRB.

4. Respondent contends, on page 13, that **Allen-Bradley Local v. Wisconsin Employment Relations Board**, 315 U. S. 740, controls this case. This assertion is erroneous for two reasons: (1) **Allen-Bradley Local** was decided before 1947 when the Taft-Hartley Act imposed restraints on labor conduct and (2) The question of NLRB jurisdiction to police the activities of both labor and management and to prevent picketline disorder of the usual type was decided in **Perry Norvell Co.**, 80 NLRB 225, where the Board said at page 239:

> "By Section 8 (b) (1) (A) Congress sought to fix the rules of the game, to insure that strikes and other organizational activities of the employees were conducted peaceably by persuasion and propaganda and not by physical force, or threats of force or of economic reprisal. In that Congress was aiming at means, not ends."

5. On page 14, respondent states, "Petitioners' charge that the Bank claimed an unfair labor practice under Section 8 of the Act is totally without record foundation or factual support." This statement is disproved simply by looking at the injunction and what activities the bank sought to restrain (See Appendix C of respondent's brief). However, it is true that there is only a small amount of evidence in the record pertaining to the nature of the dispute between CORE and Jefferson Bank. This is true because the trial court refused to permit evidence touching upon the dispute and the U. S. District Court and U. S. Court of Appeals denied an evidentiary hearing on this issue.

6. Finally, on page 15 respondent states, "... if petitioners really believed the charges they made against the Bank, they had adequate recourse through a legal and administrative process established by the State of Missouri (Chapter 296, V. A. M. S.) and the City of St. Louis, Missouri (Ordinance 51512, November 29, 1962, Ch. 482, Revised Code of City of St. Louis) . . . They cannot now claim federal labor protection for their unlawful acts."

Respondent fails to cite any case in support of this contention because the cases hold exactly the opposite of what he contends—that state and federal Civil Rights laws do not preempt the federal labor law.[2] In **Local Union 12, United Rubber Workers v. NLRB**, 368 F. 2d 12, the Court stated at page 24:

> "This problem of overlapping remedies, however, would exist in the absence of recognition of a breach of the duty of fair representation as an unfair labor practice, for undeniably labor practice charges arising under many provisions of section 8 will also involve union and employer conduct proscribed by Title VII. We recognize that while Title VII represents an appreciable addition to the protection afforded employee rights in the specific areas of discrimination covered by the Civil Rights Act, there continues to exist a broad potential range of arbitrary union conduct not specifically covered by Title VII which may also violate the union's duty of fair representation. The comprehensive right of an employee to be represented fairly and in good faith by his exclusive bargaining agent clearly encompasses more than freedom from union discrimination based solely upon race, religion and sex. **The mere fact, therefore, that Congress has seen fit to provide spe-**

[2] See also The Law and Racial Discrimination in Employment, 53 California Law Review 729, 741-750, 781-799.

cific protection to employees from union and employer discrimination in the area of civil rights in no way detracts from the legal and practical bases of our determination that a breach of the union's duty to fair representation constitutes a violation of section 8 (b) (1) (A)" (Emphasis supplied).

In addition the fact that no real alternative existed in Missouri was eloquently stated by the man who is supposed to enforce the Fair Employment Law.[3]

III.

Petitioners' Reply to Point Three of Respondent's Brief in Opposition.

1. Respondent on page 16 states that petitioners did not raise the jury issue in the state courts or the U. S. District Court and therefore the U. S. Court of Appeals properly denied relief. However, petitioners did not be-

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[3] In accepting the Man of the Year Award from the St. Louis Junior Chamber of Commerce on March 11, 1965, Peter C. Robertson, Executive Director of the Missouri Commission on Human Rights, said:

"Before I conclude I must make one last observation on the framework of law here in the State of Missouri. As of now it is just that, a 'framework'. If it is to be meaningful, and if it is to provide the Negro with a legal alternative to demonstrations, and the State of Missouri is determined to solve these problems through law then something solid must be put within the framework. For, just as our legal institutions in the past have not really made any meaningful attempt to obtain equal rights for Negroes so here in the State of Missouri the legislature which passed the Fair Employment Law did not really intend that it be used as a meaningful instrument of obtaining equal rights for our Negro citizens, for they financed it only to the extent of $24,000 a year. $24,000, and permitted the hiring of one man, to cover the entire State of Missouri. That is no alternative! However we are optimistic that the legislature intends to rectify that shortcoming in this session. If they do not then Missouri will face these very serious problems with no meaningful alternative—with no way to honestly urge citizens to use the 'courts and not the streets.'"

gin to suspect that they had a right to a jury trial until the opinion in **United States v. Barnett,** 376 U. S. 681, was announced on April 6, 1964. Petitioners' petitions for writ of habeas corpus was filed in the U. S. District Court on January 31, 1964 and therefore did not contain the jury trial issue.

In footnote 12 of **Barnett** supra at page 696 Justice Clark speaking for the Court indicated that punishment, without jury, might be constitutionally limited to that commensurate with a petty offense. The U. S. Court of Appeals below recognized petitioners' situation by stating at 362 F. 2d at page 1007, "At the time of the trial in 1963, no right to jury trial in criminal contempt cases had been established. See Green v. United States, 356 U. S. 165, 186-87. Doubtless because of this state of the law, no jury trial was demanded." In addition this Court considered the jury trial issue in **Green v. United States,** supra at page 187, where the Court explicitly considered Green's right to a jury trial even though, "petitioners themselves have not contended that they were entitled to a jury trial."

It is clear that petitioners did not waive or fail to assert any right known to them at the time they sought relief in the lower courts.[4]

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[4] In **Patterson v. Alabama,** 294 U. S. 600, Mr. Chief Justice Hughes stated the rule as follows: "We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require the Court is bound to consider any change either in fact or in law, which has supervened since the judgment was entered. We may recognize such a change, which may affect the result, by setting aside the judgment and remanding the case so that the state court may be free to act. We have said that to do this is not to review, in any proper sense of the term, the decision of the state court upon a non-federal question but only to deal appropriately with a matter arising since its judgment and having a bearing upon the right disposition of the case". 294 U. S. at 607. This quotation was used in the 1964 case of **Robert Mack Bell v. State of Maryland,** 84 S. Ct. 1814.

2. Respondent claims on page 16 that, "Petitioners make no showing that even if the **Cheff** case should apply to state courts as a Six Amendment guarantee by way of the Fourteenth Amendment, it is retroactive."

Respondent has missed the point entirely; the issue is not one of retroactivity. **Cheff v. Schnackenberg,** 384 U. S. 373, is a federal case and this Court has yet to decide whether or not the Sixth Amendment right to jury trial applies to the states through the Fourteenth Amendment. Therefore, there is no newly created right to be retroactively applied to state courts.

The line of recent cases applying the Bill of Rights to the states suggests that in the near future this Court will decide this important matter one way or another. Therefore the real questions are: (1) Does this Court wish to decide the Sixth Amendment-Jury-State issue now? and (2) Is this an appropriate case for this Court to rule on it?

Petitioner Curtis, a member of the Missouri Bar, has his legal career at stake in this proceeding and the rest hold responsible positions in the community and have families dependent upon them for support. All petitioners hope for relief from what they consider a grave injustice; but whether or not this case is selected, it seems obvious that sooner or later this Court will decide the issue presented herein.

IV.

Petitioners' Reply to Point Four for Respondent's Brief in Opposition.

Respondent on page 17, states, "The Court of Appeals held that this matter was fairly heard and determined by the State Court on appeal although the trial record is without a single objection to the Bank's lawyer presenting the evidence of contempt. It was only after the trials and convictions that Petitioners complained."

This statement is totally false as revealed by the following testimony from the transcript of this case in the state court (Tr. C. 730-734):

Page 730:

Mr. Cahill: Now, your Honor, first of all it's obvious from the testimony given here by the witnesses and questions

Page 731:

asked by Mr. Millsap himself that he conducted himself in a most improper manner by going to the home of a sixteen-year-old girl and questioning her in such a manner as to indicate to her that he, the high and mighty prosecutor and representative of a rich and mighty corporation, the bank, had the right to free her from being punished. Now, I think that is highly unethical, Your Honor, and we are asking, first of all, that her testimony, all the testimony that she gave here today be stricken from the record because of the way that it was coerced and brought into this Court. And may we have a ruling on that first, Your Honor?

The Court: Overruled.

Mr. Cahill: Thank you. Now, then, Your Honor, I should like next of all to ask this Court to remove Mr. Millsap from his position as attorney for the Court in this matter and to appoint any other member of this whole Bar to serve in that capacity. We are faced here, Your Honor, with a man who represents the plaintiff bank and who also has set himself up as prosecutor, at the Court's appointment, and he has acted in such an unethical manner that he is now both Judge, jury and executioner of all of these defendants here. They could not possibly have the benefit of the free and equal due process of the law that every defendant is entitled to, because of his unethical conduct, and because of the fact that he represents the bank herein such a manner as to preclude them

Page 732:

from having a fair trial. And we ask, Your Honor, first of all to remove him from his duty as attorney for the Court. Now, of course he can represent the bank as long as the bank wishes to retain him, but to remove him from his position as attorney for the Court and appoint any other member of the Bar, or any three members of the Bar, and five members of the Bar that the Court chooses.

The Court: Overruled.

Mr. Cahill: Thank you, Your Honor. May the record show that we have made this request, and that we point out to the Court that in matters of this kind where we have a criminal charge where the attorney representing the Court is representing the dignity and majesty of the Court, where we all want to honor and to obey, that now that duty has been given to Mr. Millsap who is a partisan in this matter, who is a party-litigant who represents the bank, and who has now taken his position as a party litigant and counsel for the bank and used that, and used that to bolster his own personal regard as far as the bank is concerned. Now, it may be that in his zeal to represent his clients he has been over zealous, all of us are sometimes, us attorneys get carried

Page 733:

away with our duties, and of course, if he has done that, it's understandable. I have had occasions, like all lawyers have, to have that temptation. But even though that may be true, Your Honor, we think the rights of these nine defendants out here demands that they be given a fair trial, and it's obvious from his conduct and from the entire course of this trial here, as the record will show, that he has not acted properly, that he has acted as a partisan and not as a prosecutor, that he has forgotten about the rights of these individuals and has concentrated solely and only on one thing, that is, the prosecution and conviction of these persons, while acting

as a private counsel. And further, I would like to point out that he is not acting only as the attorney for the Court, seated behind him is the Executive Vice-President of the bank, Mr. O'Connell. Mr. O'Connell has been here throughout every minute of these proceedings, he has counseled with him, he has talked with him. Mr. O'Connell represents the bank. This is a hearing, not the bank versus CORE, but the People of the Community, through this Court, versus CORE. And instead, the thing has been twisted and subverted so that now we have Mr. Millsap and the bank representing everybody against the poor people of CORE, and they are hopeless. The prosecutor and the judge and the private party have now become all one person. And I ask that he be removed, or that another person be appointed to sit with him and act as

Page 734:

the attorney to prosecute this matter.

The Court: Overruled.

CONCLUSION.

For the reasons herein set out petitioners urge this Court to grant this petition for certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

Nos. 870 and 871.

ROBERT B. CURTIS et al., and MICHAELA GRAND et al.,
Petitioners,

vs.

WILLIAM BOEGER, Warden, St. Louis City Jail,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

PETITION FOR REHEARING.

PETITIONERS' STATEMENT.

This Court denied Petitioners' Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit on February 13, 1967, case numbers 870 and 871. Now within twenty-five days after judgment, Petioners request a rehearing of their cases based on newly discovered evidence and matters relating to the fairness of their trials not previously presented.

GROUNDS FOR REHEARING.

I.

Prejudicial Conduct by Special Prosecutors and Right to Fair Trial.

1. During the trial of **Curtis et al.**, No. 870, Wayne Millsap, special prosecutor for the Court, pointed out passages to Judge Scott of the previous day's testimony by Joseph McConnell. When counsel for the defense requested to see that part of the previous day's transcript for impeachment purposes on cross-examination, the Court refused to allow it and overruled the request (Tr. C. 129-132):

Page 129: JOSEPH H. McCONNELL, having previously been sworn as a witness on behalf of the plaintiff, continues his testimony as follows:

Mr. Millsap: If your Honor please, here is the original deposition of Mr. McConnell, if Your Honor would like to follow the inquiry. Mr. Cahill is now interrogating in connection with the deposition.

Mr. Wilson: Judge, you have the daily transcript from the testimony of yesterday, I haven't looked at it or any thing

Page 130: may we use it?

The Court: I don't know about that, it's been just loaned to me, I don't know what the circumstances are.

Mr. Wilson: We are getting ready to use the deposition and we want to compare the testimony of yesterday with this deposition.

The Court: Mr. Millsap?

Mr. Millsap: I am sorry, I didn't hear.

Mr. Wilson: There is a daily transcript that is being prepared of the testimony?

Mr. Millsap: I am having a daily copy, that is true. Are you having daily copy, too?

Mr. Wilson: No, we are not.

Mr. Millsap: I see.

Mr. Wilson: We simply want to use it.

The Court: He is requesting—the Court, I believe, received yesterday's copy. But what is your attitude?

Mr. Wilson: Mr. Gore is acting here as official Court Reporter, Your Honor. This is not the same case as concerned with Miss Hughes here. Mr. Gore is acting as the daily Court Reporter, the daily transcript he made of the proceedings here, I think we are entitled to use.

Mr. Millsap: No, Your Honor, that is not correct. Your Honor, the copy of the transcript is being made at special request, and I know, Mr. Wilson knows and Your Honor knows that

Page 131: preparation of daily copy is quite an expensive process, and is being paid for by us. A daily copy is not a proper taxable charge, Your Honor, and it is something that we are privately employing the reporters to do, and I don't think I should be compelled to furnish this service at our cost to Mr. Wilson and the defendants.

The Court: The Court will overrule you at this time.

Mr. Wilson: All right, sir.

Mr. Millsap: Now, might I say, Your Honor——

Mr. Wilson: Now, if the Court please, I would also like to make a statement for the record——

The Court: Mr. Millsap was going to say something.

Mr. Millsap: I might say, Your Honor, that I would have no objection, Your Honor, at all, if Mr. Wilson or any of the defendants would like to make arrangements with the Court Reporter to purchase daily copy from the Court Reporter. I would not want to deny them, Your Honor, but I do not feel that we should be compelled to pay for their use of this copy which we are paying for.

Mr. Wilson: If the Court please, I would like to further point out to the Court that this is not a case of the bank

versus these alleged contemnors. As I understand from what transpired here yesterday, Mr. Millsap has been especially appointed by this Court to present these proceedings, so that the copy doesn't belong to Jefferson Bank; it belongs to this

Page 132: Court

Mr. McDuffie: I would like to further point out, if Your Honor please, this is a Court of Record, and this is the official testimony taken in this hearing, and it is public information, it's the Court's information, it's the State's information and the defendants would have a right to the transcript of the testimony here taken.

The Court: It will be overruled.

Mr. Millsap was allowed to take unfair advantage of the defendants simply because Jefferson Bank had the financial resources to purchase a daily transcript from the court reporter. Petitioners were not given a chance to show that they could not afford a daily transcript. **Griffin v. Illinois,** 351 U. S. 12. In addition petitioners have no way of determining what portions of the previous day's testimony were pointed out to Judge Scott and therefore were not given a chance to correct any erroneous impressions. Furthermore, there seems to be considerable merit in defense counsel's contention that in view of the fact that Millsap had been appointed to represent the Court, the daily transcript also belonged to the Court and should have been made available to both sides.[1] **Jencks v. United States,** 353 U. S. 657; **Giles v. Maryland,** No. 27, decided February 20, 1967.

2. Mr. Millsap having led petitioners in **Curtis et al.,** No. 870, to believe that the charges were for **civil contempt,** took their depositions on the 7th and 8th of September,

[1] Also see Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? Washington U. L. Q., June, 1963 and Goldstein, Advantage in Criminal Procedure, 69 Yale Law Journal 1149, 1180-85.

1963, under the rules of civil procedure (Tr. C. 39; 9/3/63). Then on the 18th of September, Millsap requested Judge Scott to appoint him as special prosecutor for the Court and authorize the issuance of notices of **criminal contempt** and their service on petitioners in **Curtis et al.** and four others. (See Exhibit A.) Then at the trial, Mr. Millsap introduced in evidence selected parts of the depositions as "admissions against interest" (Tr. C. 1127). Defense counsel objected to their admission but were overruled (Tr. C. 1135-44). Thus petitioners' right not to give evidence against themselves as protected by the Fifth and Fourteenth Amendments, was effectively undercut by trickery and deception on the part of Mr. Millsap.

Petitioners are now asking this Court to consider the foregoing in light of **Garrity v. New Jersey** and **Spevack v. Klein**, decided January 16, 1967.

3. Petitioners were never able to uncover the significance of John Montrey's appearance to assist Wayne Millsay in the trial of **Grand et al.**, No. 871. It was impossible for defense counsel to ascertain the amount or the source of remuneration the special prosecutors were to receive for their work. Mr. Montrey even stated that he could not reveal to the Court the source of his fee. This in spite of the fact that Judge Scott appointed him to assist Mr. Millsap (Tr. G. 21):

Page 21: Mr. Montrey: Major Eitzman, on or about October 7, 1963—

Miss Younge: Your Honor please, I would like to at this time ask the Court to direct Mr. Montrey to state how he is appearing in this case, by whom he is employed, and whether or not he's receiving remuneration for his services here and by what means he is in this case.

Mr. Montrey: If the Court please, I consider the request, perhaps, to be improper but I certainly have no objection to indicating why I am here. I was appointed with Mr. Millsap by Your Honor to present evidence in

this matter on October 7, 1963. I trust that I will be remunerated for my services, but I don't know that I can discuss that with Your Honor or with Miss Younge. I have been engaged to be of assistance to Mr. Millsap in the presentation of this matter as well as being appointed by Your Honor.

The Court: Proceed.

Miss Younge: Do I understand counsel's answer to mean that he is not employed by the bank, by the Jefferson Bank & Trust Company, he is not an attorney for the bank?

The Court: The record shows that he's attorney in this matter, so you may proceed.

Mr. Montrey's enigmatic statement, "I trust I will be remunerated for my services," indicates that he (and Millsap) may have undertaken the prosecutions on a contingent fee basis. If this is the case, such an arrangement was inherently prejudicial to the constitutional rights of the petitioners and also a violation of R. S. Mo., 1959, Secs. 56.110 and 56.130[2] and the Canons of Ethics, R. S. Mo., 1959, Supreme Court Rule 4.06.[3] The compensation

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[2] Sec. 56.110. **"If interested in case, court to appoint substitute.**—If the prosecuting attorney and assistant prosecuting attorney be interested or shall have been employed as counsel in any case where such employment is inconsistent with the duties of his office . . . the court having criminal jurisdiction may appoint some other attorney to prosecute or defend the cause." Sec. 56.130. "**Power of appointee.**—The person appointed shall possess the same power as the proper officer would if he was present and shall receive a reasonable fee for each case prosecuted to be fixed by the court and to be taxed and paid as other costs in criminal cases."

[3] Supreme Court Rule 4.06. "**Adverse Influences and Conflicting Interests.** It is the duty of a lawyer at the time of retainer to disclose to the client all the circumstances of his relations to the parties, and any interest in or connection with the controversy, which might influence the client in the selection of counsel." Judge Scott appointed Mr. Montrey to represent the Court in the interest of law and justice. Having been appointed by the Court, Montrey declined to reveal the source of his fee to the judge and opposing counsel.

of prosecuting attorneys in Missouri is fixed by law and is not dependent on the number of cases prosecuted or convictions obtained. See R. S. Mo., 1959, Secs. 56.260, 56.270, 56.280. In **Tumey v. Ohio**, 273 U. S. 510, this Court held that a trial before a judge who receives his fee only if the defendant is convicted is inherently lacking in due process. **Tumey** is analogous to the cases at bar, if the special prosecutors' fees depended on a finding of guilty by the trial judge. Also the identity of the special interest groups who subsidized the convictions of petitioners remains a mystery.

4. Petitioners also contend that Wayne Millsap violated Missouri Supreme Court Rule 4.16,[4] by failing to restrain officers of Jefferson Bank from denouncing petitioners over the radio and television and in newspaper advertisements (See Exhibit B published October 11, 1963 in the Post Dispatch, Globe Democrat, Argus, and American, during the trial of **Grand et al.** and before judgment was rendered against petitioners on October 24 and 25, 1963).

Allegations of additional prejudicial conduct by Mr. Millsap can be found on pages 25-33 of the Petition for a Writ of Certiorari and pages 12-15 of Petitioners' Reply Brief. In the event an evidentiary hearing is granted, this material and more can be introduced into evidence.

II.

Newly Discovered Evidence.

The United States District Court below, without holding an evidentiary hearing, concluded that it was the peti-

[4] Supreme Court Rule 4.16 **"Restricting Clients from Improprieties.** A lawyer should use his best efforts to restrain his clients from doing those things which the lawyer himself ought not to do, particularly with reference to their conduct towards courts, judicial officers, jurors, witnesses and suitors. If a client persists in such wrongdoing the lawyer should terminate their relation."

tioners who were guilty of racial discrimination and as such their demand on the bank was unlawful. The District Court then used this finding to support its judgment that jurisdiction rested in the state court and not the NLRB because there was no "bona fide labor dispute." 240 F. Supp. 475, 481.

Petitioner Curtis received a letter on January 29, 1967 from Peter C. Robertson, Executive Director of the Missouri Commission on Human Rights, indicating that he could resolve this issue in favor of petitioners if an evidentiary hearing is granted (See Exhibit C).

III.

Evidentiary Hearing.

The United States Court of Appeals remanded this case to the United States District Court for a determination as to whether an evidentiary hearing was required under the doctrine in **Townsend v. Sain,** 372 U. S. 293. See **Curtis v. Boeger,** 331 F. 2d 675. The United States District Court and the United States Court of Appeals below held that no facts were in dispute and that the dispute relates only to conclusions of law, **In Re Curtis' Petition,** 240 F. Supp. 475, 486, and **Ford v. Boeger,** 362 F. 2d 999, 1003 and dismissed the petitions for habeas corpus on the merits denying an evidentiary hearing.

However, the holding in **Townsend v. Sain,** supra, does not make factual dispute the sole basis for granting an evidentiary hearing. In **Townsend** this Court stated:

> "We hold that a federal court must grant an evidentiary hearing to a habeas applicant under the following circumstances: If (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding proce-

dure employed by the state court was not adequate to afford a full and fair hearing; (4) **there is a substantial allegation of newly discovered evidence**; or (5) **the material facts were not adequately developed at the state-court hearing**; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." (Emphasis supplied) 372 U. S. at page 313.

1. The following factual disputes have been raised during the course of litigation through the state and federal courts:

(a) The Court below has held at 362 F. 2d 999, 1001, that petitioners did not raise their First Amendment claims in the state court. However, petitioners have pointed out that the St. Louis Court of Appeals specifically ruled on that question in **Curtis v. Tozer**, 374 S. W. 2d 557, 595. See Petition for a Writ of Certiorari, page 9.

(b) The Court below at page 362 F. 2d 999, 1003, held that "petitioners blocked the entrances to the bank by standing in front of the entrance, locking arms and blocked entrance to the tellers' windows by sitting and lying in front of such windows." Petitioners deny this and respondent has not and cannot point to a single page number of the trial proceedings to support it. See page 11 of Petition for Writ of Certiorari.

(c) The Court below at page 62 F. 2d 999, 1008 in footnote No. 3 held, "At the time the sentences were imposed the repetitive violent demonstrations created a situation which required effective states action to reestablish law and order." There was not one word of testimony in the transcript indicating violent conduct. And if there had been respondent would surely have pointed it out to the Court. In fact all of the testimony proved that the picket line was peaceful. See page 15 of Petition for a Writ of Certiorari and Appendix D therein.

This disputed finding by the Court below is crucial in light of the fact that the Court below admitted that only violent conduct could have been enjoined by the state court, stating, "Examination of the record before us shows that only violent conduct within the scope of matters left to state jurisdiction is here enjoined". 362 F. 2d 999, 1005. And the Missouri Supreme Court has made the same holding in **United Brick and Tile Division v. Wilkinson**, 325 S. W. 2d 50, 55. See Petitioners' Reply Brief, page 7.

2. The Court below at page 362 F. 2d 999, 1003, stated, "No error was committed in denying an evidentiary hearing. At a pretrial conference called to consider the necessity of an evidentiary hearing, petitioners limited their request to produce additional evidence to the following items: (1) The nature and extent of the alleged labor dispute between CORE and the bank. (2) Bias and prejudice on the part of special prosecutor Millsap. (3) Discriminatory hiring practices of the bank.

"It appears that full opportunity was afforded in the state court to present evidence upon each of said points, and no showing has been made that the proposed additional evidence would be material upon any controlling issue before us." This statement is erroneous and in violation of **Townsend v. Sain**, supra. The following "material facts that were not adequately developed at the state court hearing or the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing", 372 U. S. 293, 313:

(a) The trial judge refused to permit evidence pertaining to the nature of the dispute and the issue of Federal preemption raised in petitioners' pleadings (Tr. C 59-74a). This ruling by the trial Court violated the due process requirements of the Fourteenth Amendment. **In**

Re Green's Petition, 369 U. S. 689 at pages 692-3. See Petition for Writ of Certiorari, page 20.

(b) Petitioners were not able to produce evidence pertaining to the prejudicial conduct of Millsap, Montrey, and officials of Jefferson Bank, some of which occurred outside of the court room and after the completion of the trials, but before judgment was rendered. In addition, petitioners were not permitted to develop facts pertaining to the financial interest of the special prosecutors in the contempt trials, the source and amount of their fees and their other tactics which petitioners claim denied them a fair trial. See part I, supra, and Petition for a Writ of Certiorari, pages 25-33.

(c) The Court below at page 362 F. 2d 999, 1008, states: "It is undisputed that Peake is a paraplegic and that he cannot move without the aid of a wheel chair . . . There is no record before us with respect to any undue hardship suffered by Peake in serving his sentence. Statements in brief without record support cannot be considered." Thus, Peake's claim under the Eighth Amendment was denied because of lack of evidence.

If an evidentiary hearing is granted, petitioners will have an opportunity to show the following: (1) the general state of Peake's health; (2) the difficulty he has in using jail toilet facilities; (3) the difficulty he has in moving into and out of his cell and into the bullpen; (4) the crowded conditions of the jail; (5) the type and quality of food served at the jail; (6) his susceptibility to illness.

4. Pursuant to the holding in **Townsend v. Sain,** supra, at page 313, petitioners assert that they can now present a substantial allegation of newly discovered evidence. This point was discussed at part II, supra.

Petitioners believe that the Court below erred in holding at 362 F. 2d 999, 1003, that "no showing has been made

that the proposed additional evidence would be material on any controlling issue before us." It seems clear as heretofore stated that (1) the factual question of petitioners' conduct and the existence or non-existence of violence is of supreme and controlling importance as to the issues of federal preemption and petitioners' right to free speech and peaceable assembly, (2) evidence pertaining to the interest, bias, conduct, conditions of employment as special prosecutor, statements to the news media, etc., by Wayne Millsap, John Montrey and officers of Jefferson Bank is of vital importance in determining whether or not petitioners' right to a fair and impartial trial were violated, (3) evidence pertaining to the nature of the dispute between Jefferson Bank and CORE is of paramount importance on the issue of state versus NLRB jurisdiction, (4) petitioners' allegations of newly discovered evidence directly contradicts an important holding of the United States District Court pertaining to the identity of the party guilty of racial discrimination, (5) evidence as to the health and physical condition, etc., of James Peake is vital to his claim of cruel and unusual punishment in violation of the Eighth Amendment.

It is important to note that several of petitioners' claims were rejected by the U. S. Court of Appeals on the ground that there is insufficient evidence to support them, while at the same time denying an evidentiary hearing.

If this procedure is sanctioned, then no evidentiary hearing would ever be held because if a transcript already contained the necessary information to support petitioner's claims he doesn't need one and if the record is deficient in this regard his claim can be rejected for lack of evidence. Therefore petitioners request that their cases be considered in light of **Pate v. Robinson**, 383 U. S. 375; **Miller v. Pate** and **Zuckerman v. Greason**, No. 71, decided February 13, 1967; **Kimbo v. Heer**, No. 751, Misc. decided February 20, 1967.

CONCLUSION.

Petitioners are not now requesting a hearing on the merits. They only ask for a day in court—an evidentiary hearing in which they might have an opportunity to establish the claims set out herein and in their Petition for a Writ of Certiorari.

Respectfully submitted,

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Pro Se.

Certificate of Counsel.

I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is based on grounds which are confined to intervening circumstances of substantial or controlling effect and on other substantial grounds available to Petitioners although not previously presented.

.....
Robert B. Curtis,
Attorney for Petitioners.

FILED
MAY 24 1967
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 870.

ROBERT B. CURTIS and WILLIAM L. CLAY,
Petitioners,

vs.

WILLIAM BOEGER, Warden, St. Louis City Jail,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

MOTION

For Leave to File Petition for Rehearing Out of Time

and

PETITION FOR REHEARING.

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ST. LOUIS LAW PRINTING CO., INC., 411-15 N. Eighth St., 63101. CEntral 1-4477.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

MOTION

for Leave to File Petition for Rehearing Out of Time.

Come now Robert B. Curtis and William L. Clay, whose petition for rehearing was denied by this Court on March 20, 1967, and respectfully move that they be granted leave to file the attached petition for rehearing out of time, because:

1. Since denying petitioners' original petition for rehearing, this Court has granted certiorari in a case raising the identical question presented here; and

2. Proceedings have been instituted since the denial of the original petition for rehearing to disbar petitioner

Curtis from the practice of law solely on the basis of the judgment rendered in this case, and without a hearing, thus severely increasing the already severe penalty imposed upon him without benefit of an impartial jury trial; and

3. Some of the parties to the original petition for rehearing have withdrawn from the case, which makes it possible for these petitioners to limit their petition for rehearing to the single question which is identical to that raised in the case in which certiorari has been granted.

Respectfully submitted,

ROBERT B. CURTIS,
2847 Union Boulevard,
St. Louis, Missouri,
Attorney for Petitioners.

Certificate of Counsel.

I hereby certify that this motion for leave to file petition for rehearing out of time is presented in good faith and not for delay and is based on grounds which are confined to intervening circumstances.

.....

PETITION FOR REHEARING.

PETITIONERS' STATEMENT.

Petitioners pray that this Court grant rehearing of its order of February 13, 1967, denying the petition for a Writ of Certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in the above-entitled case (Number 870) as prayed for in the petition filed on December 16, 1966, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT.

1. At the time of this Court's order of February 13, 1967, there was no indication that the Sixth Amendment's guarantee of an impartial jury trial would be made applicable by the Fourteenth Amendment to summary state proceedings for criminal contempt of court. However, on April 17, 1967, this Court granted certiorari in **Bloom v. Illinois**, No. 1070. One of the questions presented in that case is, "Does defendant have Fourteenth Amendment right to jury trial on Illinois criminal contempt resulting in two-year prison sentence?" 35 Law Week 3363 (April 18, 1967).

Petitioners were convicted of constructive criminal contempt for violating a temporary restraining order which had issued only three hours before the alleged contempt occurred. They were both sentenced to jail terms of 270 days and fined $1,000. They were tried and convicted without benefit of an impartial jury by the same judge who had issued the restraining order. Missouri law denies the right of jury trial to one accused of criminal contempt of court. **State v. Sheperd**, 76 S. W. 79; **De May v. Liberty Foundry Co.**, 37 S. W. 2d 648. Furthermore, Missouri statutes give a judge unlimited discretion in imposing sentence. Mo. Rev. Stat., Sec. 476.120 (1959).

In petitioners' original petition for certiorari, one of the questions presented was, "3. Whether sentences and fines of more than six months and $300 respectively imposed without jury trial are constitutionally premissible in state courts." It is arguable that sentences and fines in this amount would be permissible in the federal courts under this Court's decision in **Cheff v. Schnackenberg**, 384 U. S. 373. However, most of the parties withdrew from this case after this Court denied their original petition for rehearing on March 20, 1967. The two petitioners who remain were both sentenced to 270 days in jail and $1,000 fines. These sentences clearly would be impermissible under **Cheff v. Schnackenberg**, supra. Hence, the agonizing problem of deciding whether something which is arguably permissible under the Sixth Amendment directly might be unconstitutional under the Fourteenth Amendment has been eliminated. The issue which remains, viz., Does a defendant have a Fourteenth Amendment right to an impartial jury trial in a state proceeding for criminal contempt which results in a sentence of 270 days and $1,000 fine?, is identical in every meaningful way with that raised in **Bloom v. Illinois**, 220 N. E. 2d 475, cert. granted, 35 L. W. 3363 (1967).

2. On May 8, 1967, the Twenty-Second Judicial Circuit Bar Committee filed in the Supreme Court of Missouri a "Motion to Remove Respondent (Curtis) From Roll of Attorneys and for Disbarment." A copy of the motion is appended hereto as Exhibit A. The motion alleges that petitioner Curtis' conviction of constructive criminal contempt in this case was "of a crime involving moral turpitude," as contemplated by Mo. Rev. Stat., Sec. 484.190 (1959), and asks that he be disbarred pursuant to Sec. 484.240. The pertinent parts of these statutes provide:

> **Sec. 484.190:** "Any attorney or counselor at law may be removed or suspended from practice in the courts of this state for any of the following reasons:

(1) If he be convicted of any criminal offense involving moral turpitude; . . ."

Sec. 484.240: "If the charge allege a conviction for any criminal offense involving moral turpitude, the court shall, on the production of the record of such conviction, remove the attorney so convicted or suspend such attorney from practice for a limited time, according to the nature of the offense, as the court may deem just, **and without further trial** . . ." (Emphasis added.)

Hence it is plain that the penalty imposed upon petitioner Curtis without benefit of an impartial jury trial will exceed the 270 days and $1,000 already ordered, and may deprive him permanently of his profession and his means of earning a livelihood.

3. The convictions in this case spring from picketing against racially discriminatory hiring practices. As the Court is aware, discrimination in hiring practices continues in many parts of the country despite the best efforts of dedicated citizens to eradicate it. The Court is further aware from the many cases it has decided in recent years that peaceful picketing has become the most common form of protesting racial injustice. It has become the most common method of protest because it is virtually the only means available to the disadvantaged persons against whom the discrimination is directed. The response of those who wish to maintain the status quo has been the same as of those who wished to maintain the status quo in labor relations in an earlier day—the injunction.

Petitioners were convicted of "conspiring with" and "directing" others to violate a temporary restraining order in this case. Although they have always maintained their innocence of those charges, petitioners concede that they have exhausted whatever remedies were available to them to review the correctness of the ambiguous and

vague findings of fact. But even assuming their guilt, it is clear that the penalties imposed upon them by summary proceedings without an impartial jury were enormous—far exceeding whatever punishment was required to vindicate the majesty of the law, and the dignity of the court. The effect of permitting this judgment to stand is to hand a weapon of oppression to those who would deny the justice of petitioners' cause.

This is not to say that the justice of the cause is an excuse for violating a valid injunction. It is to say only that the sentences which may be imposed are unlimited, summary proceedings are subject to abuse as a means of oppression, and their proper role of vindicating the dignity of the law becomes lost.

This problem is recurring with greater and greater frequency today. The problem is also important because the injunction and summary proceedings are the major obstacle between the disadvantaged and the achievement of those forms of equality not already guaranteed by law. State courts need the guidance of this Court in determining the limits to which they may go in imposing sentences for alleged violations of civil rights injunctions.

CONCLUSION.

For the reasons set forth above, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that this petition for rehearing is presented in good faith and not for delay and is based on grounds which are confined to intervening circumstances.

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